



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

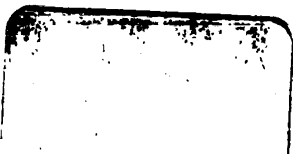
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. LVIII.

CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING
REPORTS:

79 ALABAMA; 47 ARKANSAS; 68 CALIFORNIA; 69 CALIFORNIA;
21 FLORIDA; 74 GEORGIA; 75 GEORGIA; 108 INDIANA; 109 IN-
DIANA; 69 IOWA; 38 LOUISIANA ANNUAL; 143 MASSACHU-
SETTS; 57 MICHIGAN; 89 MISSOURI; 104 NEW YORK;
44 OHIO STATE; 14 OREGON; 109 PENNSYLVANIA
STATE; 24 SOUTH CAROLINA; 22 TEXAS
COURT OF APPEALS; 67 WISCONSIN.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS

1887.

121698

JUL 29 1942

Entered, according to act of Congress, in the year eighteen hundred and eighty-seven,

By JOHN D. PARSONS, JR.,

In the office of the Librarian of Congress, at Washington.

ELECTROTYPED AND PRINTED BY
WEED, PARSONS AND COMPANY,
ALBANY, N. Y.

SCHEDULE

OF STATE REPORTS FROM WHICH CASES HAVE BEEN SELECTED FOR THE AMERICAN REPORTS.

The volumes of State Reports are in parenthesis, and the volumes of American Reports in heavy letter.

- Alabama** (44) 4; (45) 6; (46) 7; (47) 11; (48) 17; (49, 50) 20; (51, 52) 28; (53, 54) 25; (55, 56) 28; (58) 29; (59, 60) 31; (61) 32; (62) 34; (63) 35; (64) 38; (65) 39; (66) 41; (67) 42; (68, 69) 44; (71) 46; (72) 47; (73, 74) 49; (75) 51; (76) 52; (77) 54; (78) 56; (79) 58.
- Arkansas** (25) 4; (26) 7; (27) 11; (28) 18; (29, 30) 21; (31) 25; (32) 29; (33) 34; (34) 36; (35) 37; (36) 38; (37) 40; (38) 42; (39) 43; (40, 41, 42) 48; (43, 44) 51; (45, 46) 55; (47) 58.
- Baxter (Tenn.)** (1) 25; (2) no cases; (3, 4) 27; (5) 30; (6, 7) 32; (8) 35; (9) 40.
- Bush (Ky.)** (7) 3; (8) 8; (9) 15; (10) 19; (11) 21; (12) 23; (13) 26; (14) 29.
- California** (39) 2; (40) 6; (41, 42) 10; (43, 44, 45, 46) 13; (47, 48) 17; (49, 50) 19; (51) 21; (52) 28; (53) 31; (54) 35; (55) 36; (56) 38; (57) 40; (58) 41; (59) 43; (60, 61) 44; (62) 45; (63, 64) 49; (65) 52; (66, 67) 56; (68, 69) 58.
- Colorado** (1) 9; (2, 3) 25; (4) 34; (5) 40; (6) 45; (7) 49; (8) 54.
- Connecticut** (36) 4; (37, 38) 9; (39) 12; (40) 16; (41, 42) 19; (43) 21; (44) 26; (45) 29; (46) 33; (47) 36; (48) 40; (49) 44; (50) 47; (51) 50; (52) 52; (53) 55.
- Florida** (13) 7; (14) 14; (15) 21; (16) 26; (17) 35; (18) 43; (19) 45; (20) 51; (31) 58.
- Georgia** (40) 2; (41, 42) 5; (43, 44) 9; (45, 46) 12; (47, 48, 49, 50) 15; (51, 52, 53, 54, 55, 56) 21; (57, 58) 24; (59, 60) 27; (61) 34; (62) 35; (63) 36; (64) 37; (65) 38; (66) 42; (67) 44; (68) 45; (69) 47; (70) 48; (71) 51; (72) 53; (73) 54; (74, 75) 58.
- Grattan (Va.)** (20) 3; (21) 8; (22) 12; (23) 14; (24, 25) 18; (26, 27) 21; (28, 29) 26; (31) 31; (30) 32; (32) 34; (33) 36.
- Heiskell (Tenn.)** (1) 2; (2) 5; (3) 8; (4, 5) 13; (6, 7) 19; (8, 9) 24; (10, 11, 12) 27.
- Houston (Del.)** (3) 11; (4) 15.
- Illinois** (51) 2; (52) 4; (53, 54) 5; (55, 56) 8; (57, 58) 11; (59, 60, 61, 62, 63) 14; (64, 65, 66, 67) 16; (68, 69) 18; (75, 76, 77, 78) 20; (70, 71, 72, 79, 80) 22; (73, 74)* 24; (81, 82, 83, 84) 25; (85) 28; (86, 87) 29; (88) 30; (89) 31; (90) 32; (91) 33; (92, 93, 94) 34; (95) 35; (96) 36; (97) 37; (98) 38; (99, 100) 39; (101, 102) 40; (108) 42; (104, 105) 44; (106) 46; (107) 47; (108) 48; (109) 50; (110) 51; (111) 53; (112) 54; (113, 114) 55; (115, 116) 56; (117) 57.
- Indiana** (32) 2; (33) 5; (34) 7; (35) 9; (36, 37, 38) 10; (39, 40, 41, 42, 43) 13; (44, 45, 46) 15; (47, 48) 17; (49, 50, 51) 19; (52, 53) 21; (54, 55) 23; (56, 57, 58, 59) 26; (60, 61) 28; (62, 63) 30; (64) 31; (65, 66) 32; (67) 33; (68) 34; (69) 35; (70, 71) 36; (72) 37; (73) 38; (74, 75) 39; (76, 77) 40; (78, 79, 80) 41; (81, 82) 42; (83, 84) 43; (85, 86, 87) 44; (88) 45; (89, 90, 91) 46; (92, 93) 47; (94, 95) 48.

* The hiatus in the Illinois Reports arises from the fact that the volumes between the 40th and the 53th were published after the 73th and three succeeding volumes.

- (96, 97, 98) 49; (99, 100) 50; (101) 51; (102) 52; (103) 53; (104) 54; (105, 106) 55; (107) 57; (108, 109) 58.
- Iowa** (27) 1; (28, 29) 4; (30) 6; (31, 32) 7; (33, 34) 11; (35, 36) 14; (37, 38, 39) 18; (40, 41, 42) 20; (43) 22; (44, 45) 24; (46) 26; (47) 29; (48) 30; (49) 31; (50) 32; (51) 33; (52) 35; (53) 36; (54) 37; (55) 39; (56) 41; (57) 42; (58) 43; (59) 44; (60) 46; (61) 47; (62) 49; (63) 50; (64) 52; (65) 54; (66) 55; (67, 68) 56; (69) 58.
- Kansas** (5, 6) 7; (7, 8, 9) 12; (10, 11, 12) 15; (13, 14) 19; (15, 16, 17) 22; (18) 26; (19, 20) 27; (21) 30; (22) 31; (23) 33; (24) 36; (25) 37; (26) 40; (27) 41; (28) 42; (29) 44; (30) 46; (31) 47; (32) 49; (33) 52; (34) 55; (35) 57.
- Kentucky** (78) 39; (79) 42; (80) 44; (81) 50; (82) 56.
- Lea (Tenn.)** (1) 27; (2, 3) 31; (4, 5, 6, 7) 40; (8) 41; (9) 42; (10) 43; (11, 12) 47; (13) 49; (14) 52; (15) 54; (16) 57.
- Louisiana** (22) 2; (23) 8; (24, 25) 13; (26, 27) 21; (28) 26; (29) 29; (30) 31; (31) 33; (32) 36; (33) 39; (34) 44; (35) 48; (36) 51; (37) 55; (38) 58.
- MacArthur (District of Columbia)** (1, 2) 29; (3) 36.
- Mackey (District of Columbia)** (1, 2) 47; (3) 51; (4) 54.
- MacArthur and Mackey (District of Columbia)** 48.
- Maine** (57) 2; (58) 4; (59) 8; (60) 11; (61) 14; (62) 16; (63, 64) 18; (65) 20; (66) 22; (67) 24; (68) 28; (69) 31; (70) 35; (71) 36; (72) 39; (73) 40; (74) 43; (75) 46; (76) 49; (77) 52; (78) 57.
- Maryland** (31) 1; (32, 33) 3; (34, 35) 6; (36, 37) 11; (38, 39, 40) 17; (41, 42, 43) 20; (44) 22; (45, 46) 24; (47) 28; (48) 30; (49, 50) 33; (51) 34; (52, 53) 36; (54, 55) 39; (56, 57) 40; (58) 42; (59) 43; (60) 45; (61) 48; (62) 50; (63) 52; (64) 54; (65) 57.
- Massachusetts** (100) 1; (101, 102) 3; (103) 4; (104) 6; (105) 7; (106) 8; (107) 9; (108) 11; (109) 12; (110) 14; (111, 115) 15; (112, 116) 17; (113) 18; (114, 117, 118) 19; (119) 20; (120) 21; (121, 122) 23; (123) 25; (124) 26; (125) 28; (126) 30; (127) 34; (128) 35; (129) 37; (130) 39; (131) 41; (132) 42; (133) 43; (134) 45; (135) 46; (136) 49; (137) 50; (138, 139) 52; (140) 54; (141) 55; (142) 56; (143) 58.
- Michigan** (19) 2; (20, 21) 4; (22) 7; (23, 24) 9; (25, 26) 12; (27, 28) 15; (29, 30, 31) 18; (32, 33) 20; (34) 22; (35, 36) 24; (37) 26; (40) 29; (38) 31; (41) 32; (39) 33; (42) 36; (43, 44) 38; (45) 40; (46, 47) 41; (48) 42; (49) 43; (50) 45; (51) 47; (52) 50; (53) 51; (54) 52; (55) 54; (58) 55; (56) 56; (57) 58.
- Minnesota** (15) 2; (16, 17, 18) 10; (19, 20, 21) 13; (22) 21; (23) 23; (24) 31; (25) 33; (26) 37; (27) 38; (28) 41; (29) 43; (30) 44; (31) 47; (32) 50; (33) 53; (34) 57.
- Mississippi** (42) 2; (43) 5; (44, 45) 7; (46, 47, 48) 12; (49, 50) 19; (51, 52, 53) 24; (54) 28; (55) 30; (56) 31; (57) 34; (58) 38; (59) 42; (60) 45; (61) 48; (62) 52; (63) 56.
- Missouri** (46) 2; (47) 4; (48, 49) 8; (50, 51) 11; (52, 53, 54) 14; (55, 56, 57, 58) 17; (59, 60, 61, 62, 63) 21; (64, 65, 66) 27; (67) 29; (68) 30; (69) 33; (70) 35; (71) 36; (72) 37; (73) 39; (74) 41; (75) 42; (76) 43; (77) 46; (78) 47; (79) 49; (80) 50; (81) 51; (82) 52; (83) 53; (84) 54; (85) 55; (86, 87) 56; (88) 57; (89) 58.
- Montana** (1, 2) 25; (3) 35; (4) 47; (5) 51.
- Nebraska** (3, 4) 19; (5) 25; (6, 7) 29; (8) 30; (9) 31; (10) 35; (11) 38; (12) 41; (13) 42; (14) 45; (15) 48; (16) 49; (17) 52; (18) 53; (19) 56; (20) 57.
- Nevada** (6) 3; (7) 8; (9) 16; (10, 11) 21; (12) 28; (13) 29; (14) 33; (15) 37; (16) 40; (17) 45; (18) 51.
- New Hampshire** (48) 2; (49) 6; (50) 9; (51) 12; (52) 13; (53) 16; (54, 55) 20; (56) 22; (57) 24; (58) 42; (59) 47; (60) 49; (63) 56.

SCHEDULE OF STATE REPORTS.

v

- New Jersey** (34) 3; (35) 10; (36) 13; (37) 18; (38) 20; (39) 23; (40) 29; (41) 32; (42) 36; (43) 39; (44) 43; (45) 46; (46) 50; (47) 54; (48) 57.
- New Jersey Equity** (33) 36; (34) 38; (35) 40; (37) 45; (38) 48; (39) 51; (40) 53; (41) 56.
- New York** (41, 42) 1; (43) 3; (44) 4; (45) 6; (46, 47) 7; (48) 8; (49, 50, 51) 10; (52) 11; (53, 54) 13; (55) 14; (56, 57) 15; (58, 59) 17; (60, 61) 19; (62, 63) 20; (64) 21; (65) 22; (66, 67, 68) 23; (69) 25; (70) 26; (71) 27; (72) 28; (73) 29; (74) 30; (75) 31; (76) 32; (77) 33; (78) 34; (79) 35; (80) 36; (81, 82) 37; (83, 84) 38; (85) 39; (86) 40; (87) 41; (88, 89) 42; (90, 91) 43; (92) 44; 93) 45; (94) 46; (95) 47; (96) 48; (97) 49; (98) 50; (99) 52; (100) 53; (101) 54; (102) 55; (103) 57; (104) 58.
- North Carolina** (65) 6; (66) 8; (67, 68, 69) 12; (70) 16; (71) 17; (72, 73, 74) 21; (75, 76) 22; (77, 78) 24; (79) 28; (80) 30; (81) 31; (82) 33; (83) 35; (84) 37; (85) 39; (86) 41; (87) 42; (88) 43; (89) 45; (90) 47; (91) 49; (92, 93) 53; (94) 55.
- Ohio** (19) 2; (20) 5; (21) 8; (22) 10; (23) 13; (24) 15; (25) 18; (26) 20; (27, 28) 22; (29) 23; (30, 31) 27; (32) 30; (33) 31; (34) 32; (35) 35; (36) 38; (37) 41; (38) 43; (39, 40) 48; (42) 51; (41) 52; (43) 54.
- Oregon** (3) 8; (4) 13; (5) 20; (6) 25; (7) 33; (8) 34; (9) 42; (10) 45; (11) 50; (12) 53; (13) 57; (14) 58.
- Pennsylvania** (62) 1; (63, 64, 65) 3; (66, 67) 5; (68, 69) 8; (70, 71) 10; (72, 73) 13; (74, 75) 15; (76, 77) 18; (78, 79, 80) 21; (81, 82) 22; (83, 84) 24; (85, 86) 27; (87) 30; (88) 32; (89) 33; (90) 35; (91) 36; (92) 37; (93, 94, 97) 39; (95) 40; (96, 98) 42; (99) 44; (100) 45; (101) 47; (102) 48; (103, 104) 49; (105, 106) 51; (107) 52; (108, 111, 112) 56; (113) 57 (109) 58.
- Rhode Island** (8) 5; (9) 11; (10) 14; (11) 23; (12) 34; (13) 43; (14) 51.
- South Carolina** (1 N. S.) 7; (2, 3, 4) 16; (5) 22; (6, 7) 24; (8) 28; (9, 10) 30; (11, 12) 32; (13) 36; (14) 37; (15) 40; (16) 42; (17) 43; (18) 44; (19) 45; (20) 47; (21, 22) 53; (23) 55; (24) 58.
- Texas** (32) 5; (33, 34) 7; (35, 36, 37) 14; (38, 39, 40, 41, 42) 19; (43, 44, 45) 23; (46, 47, 48) 26; (49) 30; (50, 51) 32; (52) 36; (53) 37; (54) 38; (55) 40; (56) 42; (57, 58) 44; (59) 46; (60, 61) 48; (62) 50; (63) 51; (64) 53; (65) 57.
- Texas Ct. App.** (1, 2) 28; (3, 4) 30; (5, 6, 7) 32; (8) 34; (9) 35; (10) 38; (11) 40; (12) 41; (13) 44; (14) 46; (15, 16) 49; (17) 50; (18) 51; (19) 53; (20) 54; (21) 57; (22) 58.
- Vermont** (42) 1; (43) 5; (44) 8; (45) 12; (46) 14; (47) 19; (48) 21; (49) 24; (50) 23; (51) 31; (52) 36; (53) 38; (54) 41; (55) 45; (56) 48; (57) 52; (58) 56.
- Virginia** (75) 40; (76) 44; (77) 46; (78) 49; (79) 52; (80) 56.
- Washington** (1) 34.
- West Virginia** (4) 6; (5) 13; (6) 20; (7, 8) 23; (9, 10, 11) 27; (12) 29; (13) 31; (14) 35; (15) 36; (16) 37; (17, 18) 41; (19) 42 (20) 43; (21) 45; (22) 46; (23) 48; (24) 49; (25) 52; (26) 53; (27) 55; (28) 57.
- Wisconsin** (24) 1; (25) 3; (26) 7; (27, 28, 29) 9; (30, 31) 11; (32, 33) 14; (34, 35, 36) 17; (37) 19; (38, 39) 20; (40, 41) 22; (42) 24; (43, 44) 23; (45) 30; (46, 47) 32; (48) 33; (49) 35; (50) 37; (51) 37; (52) 38; (53) 40; (54) 41; (55) 42; (56) 43; (57, 58) 46; (59) 48; (60, 61) 50; (62) 51; (63) 53; (64) 54; (65) 56; (66) 57; (67) 58.

LIST OF JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

ALABAMA.

GEORGE W. STONE, CHIEF JUSTICE.
H. M. SOMERVILLE,
DAVID CLOPTON.

ARKANSAS.

STERLING R. COCKRILL, CHIEF JUSTICE.
WILLIAM W. SMITH,
BURRILL B. BATTLE.

CALIFORNIA.

R. F. MORRISON, CHIEF JUSTICE.
E. W. McKINSTRY,
E. M. ROSS,
S. B. MCKEE,
M. H. MYRICK,
J. D. THORNTON,
J. R. SHARPSTEIN.

COMMISSIONERS.

I. S. BELCHER, CHIEF COMMISSIONER.
H. S. FOOTE,
NILES SEARLS.

FLORIDA.

GEORGE G. McWHORTER, CHIEF JUSTICE.
R. B. VAN VALKENBURGH,
GEORGE P. RANEY.

GEORGIA.

JAMES JACKSON, CHIEF JUSTICE.
SAMUEL HALL,
M. H. BLANDFORD.

LIST OF JUDGES.

vii

INDIANA.

BYRON K. ELLIOTT, CHIEF JUSTICE.
ALLEN ZOLLARS, CHIEF JUSTICE
JOSEPH A. S. MITCHELL,
WILLIAM E. NIBLACK,
GEORGE V. HOWE.

IOWA.

AUSTIN ADAMS, CHIEF JUSTICE.
WILLIAM H. SEEVERS,
JOSEPH R. REED,
JAMES H. ROTHROCK,
JOSEPH M. BECK.

LOUISIANA.

EDWARD BERMUDEZ, CHIEF JUSTICE.
FELIX P. POCHÉ,
ROBERT B. TODD,
THOMAS C. MANNING,
CHARLES E. FENNER,
LYNN B. WATKINS.

MASSACHUSETTS.

MARCUS MORTON, CHIEF JUSTICE.
WALBRIDGE A. FIELD,
CHARLES DEVENS,
WILLIAM ALLEN,
CHARLES ALLEN,
OLIVER WENDELL HOLMES, JR.,
WILLIAM S. GARDNER.

MICHIGAN.

THOMAS M. COOLEY, CHIEF JUSTICE.
JAMES V. CAMPBELL,
THOMAS R. SHERWOOD,
JOHN W. CHAMPLIN.

MISSOURI.

JOHN W. HENRY, CHIEF JUSTICE.
ELIJAH H. NORTON,
ROBERT D. RAY,
THOMAS A. SHERWOOD,
FRANCIS M. BLACK.

LIST OF JUDGES.

NEW YORK.

WILLIAM C. RUGER, CHIEF JUDGE.
CHARLES ANDREWS,
CHARLES A. RAPALLO,
ROBERT EARL,
GEORGE F. DANFORTH,
FRANCIS M. FINCH,
RUFUS W. PECKHAM.

OHIO.

GEORGE W. McILVAINE, CHIEF JUSTICE.
MARTIN D. FOLLETT,
WILLIAM T. SPEAR,
SELWYN N. OWEN,
W. W. JOHNSON.

OREGON.

JOHN B. WALDO, CHIEF JUSTICE.
WM. P. LORD,
W. W. THAYER.

PENNSYLVANIA.

ULYSSES MERCUR, CHIEF JUSTICE.
ISAAC G. GORDON,
EDWARD M. PAXSON.
JOHN TRUNKEY,
JAMES P. STERRETT,
HENRY GREEN,
SILAS M. CLARK.

SOUTH CAROLINA.

WILLIAM D. SIMPSON, CHIEF JUSTICE.
HENRY McIVER,
SAMUEL MCGOWAN.

TEXAS.

JOHN P. WHITE, PRESIDING JUDGE.
JAMES M. HURT,
SAMUEL A. WILLSON.

LIST OF JUDGES.

ix

WISCONSIN.

ORSAMUS COLE, CHIEF JUSTICE.

WILLIAM P. LYON,

DAVID TAYLOR,

HARLOW S. ORTON,

JOHN B. CASSODAY.

VOL. LVIII—B

INDEX OF PAGES

AT WHICH THE DIFFERENT STATE REPORTS MAY BE FOUND.

	PAGE.
ALABAMA.....	580-629
ARKANSAS.....	752-780
CALIFORNIA.....1-21;	545-579
FLORIDA.....	665-707
GEORGIA.....	435-483
IOWA.....	207-236
INDIANA.....22-81;	375-424
LOUISIANA.....	155-206
MASSACHUSETTS.....	126-154
MICHIGAN.....	327-374
MISSOURI.....	82-125
NEW YORK.....	484-544
OHIO.....	781-847
OREGON.....	281-326
PENNSYLVANIA.....	708-751
SOUTH CAROLINA.....	237-280
TEXAS.....	630-664
WISCONSIN.....	848-886

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Abbott v. Inhabitants of Cottage City.	143	Castle v. Rickly	839
Adams v. Young	789	Caulkett ads. Thomas	369
Agnew v. Charlotte, etc., Railroad Co.	237	Central Railroad v. Crosby	463
Aiken v. Western Union Telegraph Co.	210	Central Pacific Railroad Co. ads. Dur-	
Alexander v. Continental Ins. Co. of		kee	562
New York	869	Chambers ads. Wakeman	218
Allen v. Craft	425	Chaney v. Hoxie	149
Allen ads. Watrous	863	Charlotte, etc., Railroad Co. ads. Ag-	
Allen County ads. James	821	new	237
Annas v. Milwaukee, etc., Railroad Co.	848	Chase v. City of Cleveland	843
Arcade Hotel Co. v. Wiatt	785	Cheraw, etc., Railroad Co. v. Broadnax	733
Aultman ads. Huff	218	Chicago, etc., Railway Co. ads. Burns.	227
Ayres v. Hubbard	861	Chicago, etc., Railroad Co. ads. Everett	207
		Chicago & Northwestern R. Co. ads.	
Bank of Watertown ads. Bursinger...	848	Schultz	881
Barrie v. Earle	126	City of Cleveland ads. Chase	843
Baxter ads. Shisler	738	Clifton v. Howard	97
Becker v. Koch	515	Cobb ads. Western Union Tel. Co.	756
Belton ads. State	245	Collier v. Davis	758
Birmingham, etc., Street Railway Co.		Collier ads. Patterson	472
v. Birmingham Street Railway Co..	615	Colton v. Onderdonk	556
Bondurant ads. Smith	438	Com. v. Moore	123
Bourneuf ads. Flynn	135	Com. v. Teevens	131
Boyer ads. Rice	53	Continental Ins. Co. ads. Alexander	369
Braddy v. City of Milledgeville	443	Cottage City, Inhabitants of, ads. Ab-	
Bright ads. State	155	bott	143
Broadnax ads. Cheraw, etc., Railroad		Cowdery, Matter of	545
Co.	733	Craft ads. Allen	425
Brown v. Sennett	8	Crosby ads. Central Railroad	463
Brown v. Susquehanna Boom Co.	708	Cross v. Kitts	558
Bundy v. State	263	Cummings v. Kent	796
Burns v. Chicago, etc., Railway Co.	227	Curtis v. State	635
Bursinger v. Bank of Watertown	843		
Butler v. Wendell	329	Dalton, Matter of	800
Byrne v. New York Central, etc., R.		Danforth v. State	490
Co.	512	Davis ads. Collier	758
		Davis v. New York, etc., Railroad ...	138
Carman ads. Winchester Wagon		Day v. Spiral Springs Buggy Co.	352
Works, etc., Co	382	Delaware, etc., Railroad Co. v. Sander-	
Carrington v. City of St. Louis	108	son	743
Carroll County v. Ruggles	223	Detroit ads. McKellar	357

TABLE OF CASES REPORTED.

PAGE.	PAGE.
Dixon ads. Greeley..... 678	Hines v. Duncan..... 580
Dolan ads. Naltner..... 61	Hodge ads. Martin..... 763
Donnelly ads. State..... 234	Holefield ads. Johnson..... 596
Duncan ads. Hines..... 580	Hollis v. Meux..... 574
Durdin v. Hill..... 467	Holzab v. New Orleans, etc., Railroad Co..... 177
Durkee v. Central Pacific Railroad Co. 562	Hooven ads. Willingham..... 435
Dyer v. Wittler..... 85	Howard ads. Clifton..... 97
Earle ads. Barrie..... 126	Hoxie v. Chaney..... 149
Eastman v. State..... 400	Hubbard ads. Ayres..... 361
Ellis v. Milwaukee City Railway Co. 858	Hubbell v. City of Yonkers..... 523
Emmelman ads. City of Indianapolis.. 65	Hubbell v. City of Viroqua..... 366
Evansville, City of, ads. Rice..... 92	Huff v. Aultman..... 213
Everett v. Chicago, etc., Railroad Co. 207	Hull v. Louth..... 405
Ezzard v. Findley Gold Mining Co.... 445	Indianapolis, City of, v. Emmelman.. 65
Fain v. Smith..... 281	Indianapolis, etc., Railway Co. v. Pitzer..... 387
Fairbanks v. Sargent..... 490	Insurance Co. v. Pyle..... 781
Farley v. Moog..... 585	James v. Allen County..... 631
Fidelity, etc., Co. of New York ads. Saveland..... 363	Jemison v. South-western Railroad... 476
Filson ads. McClellan..... 814	Johnson v. Holifield..... 596
Findley Gold Mining Co. ads. Ezzard . 445	Johnson v. Miller..... 331
First National Bank v. Marks..... 620	Johnson v. Pelot..... 253
Flynn v. Bourneuf..... 135	Jones v. Townsend's Adm'r..... 676
Foster v. Runk..... 720	Judge of Civil District Court ads. State 158
Garrey v. Stadler..... 877	Kalis v. Shattuck..... 568
Gee v. McMillan..... 315	Kanawha Valley Bank ads. Robinson. 829
Geiger ads. Savannah, etc., Railway Co..... 697	Kempner v. Cohn..... 775
Gilmer v. Mobile & Montgomery Railway Co..... 623	Kent ads. Cummings..... 796
Goodman ads. Merchants Nat. Bank of Phila..... 728	Kincheloe v. Priest..... 117
Greeley v. Dixon..... 673	Kitchen v. Hartford Fire Insurance Co..... 344
Green v. State..... 670	Kitts ads. Cross..... 558
Green v. Watson..... 479	Koch ads. Becker..... 515
Grimmett v. State..... 630	Kohn ads. Sparrow..... 726
Guittard ads. Pierce..... 1	Konvalinka v. Schlegel... 494
Gunn v. Gunn..... 447	Kunz v. City of Troy..... 508
Haas ads. Schneider..... 296	Lafayette, City of, ads. Sherwood.... 414
Habenicht v. Rawls..... 268	Lancaster ads. McLure..... 259
Hand v. Hand..... 5	Lancaster ads. Neelly..... 752
Hannibal, etc., R. Co. ads. Harris... 111	Landis v. Roth..... 747
Hanson v. Mansfield Railway & Transp. Co..... 162	Leache v. State..... 633
Harris v. Hannibal & St. Louis R. Co. 111	Lewis v. New York Sleeping Car Co.. 135
Hartford Fire Ins. Co. ads. Ketchum. 344	Long v. State..... 633
Hathaway ads. Sinclair..... 327	Louth ads. Hull..... 405
Highland ads. Rogers..... 280	Manhattan Life Ins. Co. v. Smith 806
Hill ads. Durdin..... 467	Mansfield, etc., Transp. Co. ads. Hanson..... 162

TABLE OF CASES REPORTED.

xiii

	PAGE.		PAGE.
Marks v. First National Bank	620	New York Central Railroad Co. ads.	
Martin v. City of New Orleans	194	Byrne	512
Martin v. Hodge	768	New York, etc., Railroad ads. Davis ..	188
Mason ads. Penn., etc., Canal & Rail-		New York Sleeping Car Co. ads. Lewis	126
road Co.	722	New York, etc., Railroad Co. ads.	
Maury v. Ranger	197	People	484
McClellan v. Filson	814	Onderdonk ads. Colton	556
McConnell v. State	647	Oregon, etc., Navigation Co. v. Mosier	821
McElrath ads. Osment	17	Orman v. State	662
McKellar v. Detroit	357	O'Sullivan ads. People	580
McLure v. Lancaster	259	Osment v. McElrath	17
McLure v. Melton	272	Osterbrink ads. Schaefer	875
McManus ads. Williams	171		
McMillan ads. Gee	815	Patterson v. Collier	472
McPherson, Matter of	502	Payne v. Morgan's Louisiana, etc.,	
Melton ads. McLure	272	Steamship Co.	174
Merchants' National Bank of Phila. v.		Pelot ads. Johnson	258
Goodman	728	Penn ads. Watson	26
Meux ads. Hollis	574	Penn. Coal Co. v. Winchester	740
Milledgeville, City of, ads. Braddy ...	448	Penn., etc., Canal & Railroad Co. v.	
Miller ads. Johnson	281	Mason	722
Millegan ads. Quick	49	People v. New York, etc., Railroad Co	484
Milwaukee, etc., Railroad Co. ads.		People v. O'Sullivan	580
Annas	843	People v. Shaw	872
Milwaukee, etc., Railway Co. ads. Ellis	858	People v. Smith ..	587
Minnesota Mining Co. ads. National		Phillips v. Waterhouse	220
Copper Co	888	Pierce v. Guittard	1
Missouri Pacific Railway Co. ads.		Pioneer Co-operative Co. ads. Salomon	687
Thorpe	120	Pitzer ads. Indianapolis Railway Co ..	887
Mitchell v. Zimmerman	715	Pocock v. Redinger	71
Mobile v. Montgomery Railway Co.		Poggensee v. Mutual Fire, etc., Ins. Co	215
ads. Gilmer	628	Portland, City of, ads. Portland, etc.,	
Molisee ads. State	181	Railroad Co	299
Moog ads. Farley	585	Portland, City of, ads. Selby	307
Moore ads. Com	128	Preston v. Witherspoon	417
Moore ads. State	241	Priest ads. Kincheloe	117
Morgan's, etc., Steamship Co. ads.		Pyle ads. Insurance Co	781
Payne	174		
Mosier ads. Oregon Railway & Nav. Co	821	Quick v. Milligan	49
Mutual Fire, etc., Ins. Co. ads. Poggen-		Railway Company v. Spangle	838
see	215	Randolph ads. Robinson	692
Myers ads. Smith	875	Ranger ads. Maury	197
		Rawls ads. Habenicht	268
Nally v. Nally	458	Raymond v. Russell	137
Naltner v. Dolan	61	Redinger ads. Pocock	71
National Copper Co. v. Minn. Mining		Reink ads. Foster	720
Co	888	Reynolds ads. Snodgrass	601
Neelly v. Lancaster	752	Rice v. Boyer	53
Nelson ads. State	202	Rice v. City of Evansville	22
New v. Walker	40	Rickly ads. Castle	839
New Orleans, City of, ads. Martin	194	Robert v. Sadler	495
New Orleans, City of, ads. State	168		
New Orleans, etc., Railroad Co	177		

	PAGE.		PAGE.
Robertson ads. State.....	201	State ads. Curtis.....	625
Robinson v. Kanawha Valley Bank....	829	State ads. Danforth.....	420
Robinson v. Randolph.....	692	State v. Donnelly.....	224
Rogers v. Highland.....	220	State ads. Eastman.....	400
Rollins v. State.....	659	State ads. Green.....	670
Rome Railroad v. Wimberly.....	463	State ads. Grimmett.....	630
Roth ads. Landis.....	747	State v. Judge of Civil District Court.	158
Ruggles ads. Carroll County.....	223	State ads. Leache.....	638
Russell ads. Raymond.....	187	State ads. Long.....	633
		State ads. McConnell.....	647
Sadler ads. Robert.....	493	State v. Molisse.....	181
Salomon v. Pioneer Co-operative Co....	667	State v. Moore.....	241
Sanderson ads. Delaware, etc., Rail- road Co.....	743	State v. Nelson.....	202
Sargent ads. Fairbanks.....	490	State ads. Orman.....	662
Savannah, etc., Railway Co. v. Geiger.	697	State v. Robertson.....	201
Saveland v. Fidelity & Casualty Co....	863	State ads. Rollins.....	659
Scales v. State.....	768	State ads. Scales.....	768
Schaefer v. Osterbrink.....	875	State ads. Taylor.....	656
Schlegel ads. Konvalinka.....	494	State ads. Varnedoe.....	465
Schneider v. Haas.....	296	State v. Webber.....	30
Schultz v. Chicago & Northwestern R. Co.....	881	State ads. Wolfe.....	590
Selby v. City of Portland.....	807	Susquehanna Broom Co. ads. Brown.	708
Sennett ads. Brown.....	8	Tabler v. Sheffield, etc., Coal Co.....	593
Shattuck ads. Kalis.....	568	Taylor v. State.....	656
Shaw ads. People.....	872	Teevens ads. Com.....	131
Sheffield, etc., Coal Co. ads. Tabler....	592	Thomas v. Caulkett.....	369
Sherwood v. City of Lafayette.....	414	Thorpe v. Missouri Pacific Railway Co.....	120
Shisler v. Baxter.....	738	Tidwell v. Witherspoon.....	665
Sinclair v. Hathaway.....	327	Townsend's Adm'r ads. Jones.....	676
Sloan ads. Spencer.....	35	Troy, City of, ads. Kunz.....	506
Smith v. Bondurant.....	438		
Smith ads. Fain.....	281	Varnedoe v. State.....	465
Smith ads. Manhattan Life Ins. Co....	806	Viroqua, City of, ads. Hubbell.....	866
Smith v. Myers.....	375		
Smith ads. People.....	537	Wakeman v. Chambers.....	218
Snodgrass v. Reynolds.....	601	Walker ads. New.....	40
Southwestern Railroad ads. Jemison....	476	Waterhouse ads. Phillips.....	220
Spangle ads. Railway Co.....	833	Watrous v. Allen.....	363
Sparrow v. Kohn.....	726	Watson ads. Green.....	479
Spencer v. Sloan.....	35	Watson v. Penn.....	26
Spiral Springs Buggy Co. ads. Day....	352	Watson v. Watson.....	247
St. Louis, City of, ads. Carrington....	108	Webber ads. State.....	30
St. Louis, City of, v. St. Louis Rail- road Co.....	82	Wendell ads. Butler.....	329
St. Louis Railroad Co. ads. City of St. Louis.....	82	Western Union Telegraph Co. ads. Aiken.....	210
Stadler ads. Garrey.....	877	Western Union Tel. Co. v. Cobb.....	756
State v. Belton.....	245	Wiatt ads. Arcade Hotel Co.....	785
State v. Bright.....	155	Williams v. McManus.....	171
State v. Bundy.....	262	Willingham v. Hooven.....	435
State v. City of New Orleans.....	168	Wimberly ads. Rome Railroad.....	468
		Winchester ads. Penn. Coal Co.....	740

TABLE OF CASES REPORTED.

XV

	PAGE.		PAGE.
Winchester Wagon Works, etc., Co.		Yonkers, City of, ads. Hubbell.....	522
v. Carman.....	362	Young ads. Adams	769
Witherspoon ads. Preston.....	417	Yick Wo, Matter of.....	12
Witherspoon ads. Tidwell.....	665		
Wittler ads. Dyer.....	85	Zimmerman ads. Mitchell.....	715
Wolfe v. State.....	590		

TABLE OF CASES CITED.

	PAGE.		PAGE.
Abbot v. Keith, 11 Vt. 525	455	Armil v. Chicago, B. & Q. R. Co., Iowa	
Abbott v. Millis, 3 Vt. 521, 535	144	Sup. Ct., Oct. 24, 1886	187
Abbott v. Shepard, 48 N. H. 14	778	Armington v. Houston, 38 Vt. 448	386
Abrahams v. Swann, 18 W. Va. 274; 41		Armour v. Mich. C. R. Co., 65 N. Y. 111,	
Am. Rep. 692	750, 751	122; 22 Am. Rep. 603	493
Abrey v. Cruz, L. R., 5 Com. P. 37	799	Armstrong v. Brunswick, 79 Mo. 319	111
Adair v. Bogle, 20 Iowa, 238, 242	604, 607	Arnold v. Wilt, 86 Ind. 367	25
Adams v. Goodnow, 101 Mass. 81	219	Ashley v. Ashley, 3 Sim. 149	849, 855
Adams v. Pink, 53 Ill. 219	105	Astor v. Hoyt, 5 Wend. 603	417
Adams v. Lindsell, 1 Barn. & Ald. 681	778	Atchison, etc., R. Co. v. Weber, 33	
Adams v. Railroad Co., 18 Minn. 200	337	Kans. 543; 52 Am. Rep. 543	391
Adams v. Wordley, 1 M. & W. 374	835	Atchison, etc., R. Co. v. Filan, 24	
Adair v. Adair, 2 Johns. Ch. 449; 7 Am.		Kans. 327	399
Dec. 539	495, 497	Atchison, T. & Santa Fe R. Co. v.	
Ætna Life Ins. Co. v. France, 91 U. S.		Stanford, 13 Kans. 354; 15 Am. Rep.	
510; 44 U. S. 561	783, 853	363	798
Ahrend v. Odiorne, 118 Mass. 261; 28		Atchison, T. & Santa Fe R. Co. v.	
Am. Rep. 199	817, 819	Bales, 18 Kans. 252	798
Aiken v. Benedict, 39 Barb. 400	446, 447	Atkinson v. Jordan, 5 Ohio, 178; 24	
Aimfield v. Nash, 34 Miss. 381	830	Am. Dec. 281	875, 790
Ake v. State, 6 Tex. Ct. App. 398	657	Atlantic City Water Works v. Atlantic,	
Aldrich v. Press Printing Co., 9 Minn.		39 N. J. Eq. 367; 10 Am. & Eng. Corp.	
138	673, 681	Cas. 59	618
Alfaro v. De La Forra, 3 Cent. L. J. 473	96	Atlantic Dock Co. v. Leavitt, 54 N. Y.	
	99	35; 13 Am. Rep. 553	368, 638
Alger v. R. Co., 10 Iowa, 298	697	Atlantic, etc., R. Co. v. Reisner, 16	
Allcott v. Barber, 1 Wend. 536	402	Kans. 458	393
Allen v. Allen, 18 Ohio St. 284	816	Attorney-General v. Bishop of Chester,	
Allen v. Kinyon, 41 Mich. 231	868	1 Bro. C. C. 444	600
Allen v. Merchants' Bank of New York,		Attorney-General v. Brown, 1 Wis. 513	381
15 Wend. 432; 22 Wend. 215	731	Attorney-General v. Railroad Cos., 35	
Allen v. Richardson, 9 Rich. Eq. 58	239	Wis. 425	861
Allen v. Willard, 57 Penn. St. 374	229	Attwater v. Mayor, etc., 31 Md. 462	110
Allemania Fire Ins. Co. v. Hurd, 37 Mich.		Atwell v. McIntosh, 120 Mass. 183	678
11	347	Averill v. Hedge, 12 Conn. 423	779
Allison v. Chandler, 11 Mich. 542	363		
Ambler v. Bradley, 6 Vt. 119	101, 107	B. & M. Railroad v. Wendt, 12 Neb. 76	703
American Ins. Co. v. Gallatin, 48 Wis. 38	872	Baals v. Stewart, 109 Ind. 371	385
Ames Iron Works v. Warren, 76 Ind.		Baccolgalupo v. Commonwealth, 33 Gratt.	
512; 40 Am. Rep. 258	42	807; 38 Am. Rep. 795	493
Ames v. McComber, 124 Mass. 85, 91	138	Baccio v. People, 41 N. Y. 265	534
Armstrong v. Toler, 11 Wheat. 268	765	Badger v. Titcomb, 15 Pick. 409, 413;	
Anderson v. Dunn, 6 Wheat. 204	380, 801	28 Am. Dec. 611	127
	802, 804	Baggett v. Meux, 1 Coll. 138	693
Anderson v. Etter, 102 Ind. 115	47	Bagley v. Fletcher, 44 Ark. 153	755
Anderson v. Hubble, 93 Ind. 570; 47 Am.		Bailey v. Kalamazoo Pub. Co., 40 Mich.	
Rep. 304	51	257	692
Anderson v. Thornton, 8 Exob. 425	734	Bailey v. Mogg, 4 Den. 60	403
Anderson v. Warne, 71 Ill. 20; 22 Am.		Bailey v. Sauger, 108 Ind. 284	427
Rep. 53	621, 622	Bain v. Futhergill, L. R., 7 Eng. & Ir.	
Anderson v. Keith, 34 Ala. 723	586	App. 158	609
Andrews, Ex parte, 18 Cal. 678	770, 774	Baldwin v. Calkins, 10 Wend. 169	319
Andrews v. Spurrin, 35 Ind. 262	427	Baker v. Drake, 63 N. Y. 211	362
Angier v. Webber, 14 Allen. 211	153	Baldwin v. Fagan, 83 Ind. 447	46
Annelly v. DeSaussure, 17 S. C. 391	257	Bail v. Green, 90 Ind. 75	415
Antle v. State, 6 Tex. App. 308	404	Bail v. Nye, 90 Mass. 582-584; 8 Am. Rep.	
Antley v. State, 6 Tex. App. 202	402	318	557
Appel v. Byers, 98 Penn. St. 479	76	Ballard v. Burgett, 40 N. Y. 814	494
Aran v. Frey, 99 Ind. 91	606	Ballard v. Tomlinson, 24 Am. Law Reg.	
Archard v. Hornor, 3 Carr. & P. 349	536	636	563
Archibald v. Mut. Life Ins. Co., 38 Wis.		Ballou v. C. & N. W. R. Co., 54 Wis.	
542	849	299	393

PAGE.	PAGE.
Baltimore, etc., R. Co. v. Schwindling, 101 Penn. St. 256; 47 Am. Rep. 706	389
Baltimore, etc., R. Co. v. State, 33 Md. 542	394
Baltimore, etc., R. Co. v. Thompson, 10 Md. 76	417
Bank v. Wilkins, 9 Me. 23	589
Bank of Auburn v. Roberts, 44 N. Y. 192	415
Bank of Commerce v. Barrett, 38 Ga. 126	45
Bank of Hamilton v. Dudley, 3 Peters, 499	279
Bank of Hartford County v. Waterman, 28 Conn. 324	338
Bank of the Metropolis v. New England Bank, 1 How. 234	39
Bank of Washington v. Triplett, 1 Pet. 35	731
Barber v. Cazalis, 30 Cal. 92	101
Barber v. Roxbury, 11 Allen 318	867
Barbler v. Connolly, 113 U. S. 27	16
Barb v. Yohn, 26 Penn. St. 483	576
Barker v. Meo. Fire Ins. Co., 3 Wend. 94; 20 Am. Dec. 664	831
Barnard v. Bartholomew, 22 Pick. 291	751
Barnard v. Gaslin, 23 Minn. 192	799
Barnes v. Stimms, 5 Ired. Eq. 392	78
Barnett v. State, 54 Ala. 579	595
Barr v. Moore, 84 Penn. St. 385; 30 Am. Rep. 367	678, 692
Barrett v. Blagrave, 5 Ves. 555	368
Barry v. Morse, 3 N. H. 132	799
Barry v. N. Y. Cent. and H. R. R. Co., 92 N. Y. 289; 44 Am. Rep. 377	513
Barrow v. Richard, 30 Paige, 354	368
Barth v. State, 18 Conn. 432	669
Bartlett v. Gillard, 3 Russ. 153	262
Bartlett v. Hamilton, 46 Me. 435	64
Bartlett v. Lee, 53 Ga. 491	799
Bartlett v. Vinor, Cart. 252	765
Baskitt v. Hassell, 107 U. S. 602	294
Bassett v. Percival, 5 Allen, 345, 347	153
Bassett v. St. Joseph, 53 Mo. 298; 14 Am. Rep. 446	109
Basye v. Adams, 81 Ky. 368	857
Batchelder v. Queen Ins. Co, 136 Mass. 449	136
Bates v. Bates, 134 Mass. 110; 45 Am. Rep. 305	598, 600
Bates v. Spooner, 45 Ind. 493	666
Bathje v. Railroad Co., 26 Tex. 604	704
Battisbill v. Reed, 17 C. B. 696	339
Bay v. Coddington, 5 Johns. Ch. 54; 9 Am. Dec. 268	39
Bayless v. Glens, 72 Ind. 5	45
Bayonne v. Ford, 14 Vroom. 292	144
Beal v. Chase, 31 Mich. 490	336
Beal v. Nevil, 4 B. & Ald. 571	751
Beal v. Ray, 7 Ind. 554	877
Beaufort v. Colyer, 6 Rumph. 486	694
Beaumont v. Fell, 2 P. Wms. 78	562
Beazley v. Mitchell, 9 Ala. 790	69
Beck v. Carter, 68 N. Y. 283; 23 Am. Rep. 175	826
Beckham v. Drake, 2 H. L. 606	377
Beebe v. Robinson, 52 Ala. 66	101
Beecher v. Bush, 45 Mich. 188; 40 Am. Rep. 465	560
Beer v. Ward, Jacob, 77	11
Beeson v. Green Mountain Co., 57 Cal. 31	293
Belden v. Carter, 4 Day. 69	790
Bell v. Lord Ingestre, 12 Q. B. 317	750
Bell v. Morrison, 1 Feb. 265	
Bellmare v. Bank of United States, 4 Whart. 105; 31 Am. Dec. 46	731
Belles v. Belles, 7 Halst. 389	450, 462
Bellovs v. Sackett, 15 Barb. 96	572
Belo v. Wren, 5 Tex. Law Rev. 153	699
Bender v. Fleurie, 2 Grant, 245	432
Bending v. Bending, 3 Kay & J. 267	497
Benedict v. Heterick, 35 Sup. Ct. (N. Y.) 505	102
Bennett v. Mellor, 5 T. R. 374	788
Bennett v. State, 1 Swan, 411	246
Bentley v. Harris, 10 K. I. 434; 14 Am. Rep. 665	105
Beresford v. Archbishop, 13 Sim. 643	261
Berry v. Anderson, 23 Ind. 36	50
Berry v. Jenkins, 3 Bing. 433	555
Bertles v. Nunan, 92 N. Y. 180; 44 Am. Rep. 361	755
Best v. Flint, 58 Vt. 543; 56 Am. Rep. 570	729
Betta v. Dimon, 3 Conn. 107	466
Bibbs v. Freeman, 59 Ala. 612	602
Bibbs v. Reid, 3 Ala. 88	623
Bibber v. Simpson, 59 Me. 181	402
Bigelow v. Colton, 13 Gray, 309; 74 Am. Dec. 623	799
Biggs v. McCarty, 86 Ind. 352; 44 Am. Rep. 320	427
Billman v. Indianapolis, etc., R. Co., 76 Ind. 166; 40 Am. Rep. 230	364
Binford v. Adams, 104 Ind. 41	25
Binford v. Johnston, 82 Ind. 426; 42 Am. Rep. 508; 43 Am. Rep. 502	389, 396
Binghamton Bridge, 3 Wall. 52	616
Bird v. Holbrook, 4 Bing. 633	389
Bird, ex parte, 19 Cal. 130	770
Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261	399
Bishop v. Union R. Co., 14 R. I. 314; 51 Am. Rep. 396	396
Bissell v. Collins, 28 Mich. 277; 15 Am. Rep. 217	500
Black v. Richards, 95 Ind. 184	73
Black v. Shreve, 18 N. J. Eq. 455	50
Blackburn v. State, 23 Ohio St. 148	642
Blackwell v. Rankin, 7 N. J. Eq. 152	589
Blaine v. Chesapeake, etc., R. Co., 9 W. Va. 255	168
Blair v. Drew, 6 N. H. 235	453
Blair v. Hanna, 57 Ind. 298, p. 301	416
Blair v. Walt, 69 N. Y. 113	51
Bledsoe v. Sims, 53 Mo. 305	95
Bliss v. Anderson, 31 Ala. 612	595
Blooker v. Burness, 2 Ala. 354	246
Bloomington Mut. Ben. Ass'n v. Blue, 111. Sup. Ct. Mar. 22, 1897	852
Blossom v. Knox, 3 Pin. 262	609
Blum v. Carter, 63 Ala. 235	582
Blunt v. McCormick, 3 Den. 283	399
Board of Commissioners of Leaven- worth v. Sellow, 99 U. S. 623, 624, 199	161
Board, etc. v. Anderson, 63 Ind. 367	54
Bodenheim v. Hoskyns, 2 De Gex, M. and G. 903	591
Bond v. State, 20 Tex. Ct. App.	639
Bonham's case, 8 Co. 227	492
Bonomi v. Backhouse, El. Bl. & El. 622	399
Bool v. Mix, 17 Wend. 119; 31 Am. Dec. 284	55
Booze v. Pac. Railroad, 83 Mo. 212	829
Borough of Pittston v. Hart, 39 Penn. St. 389	527
Boston Distric Co. v. Florence Manuf. Co., 114 Mass. 69	137
Boston & Col. Smelt. Co. v. Smith, 13 R. I. 27; 43 Am. Rep. 3	101, 102
Boswell v. State, 63 Ala. 307; 35 Am. Rep. 301	482, 643
Bott v. McCoy, 20 Ala. 578	582
Bottenberg v. Nixon, 97 Ind. 106	420

TABLE OF CASES CITED.

xix

PAGE.	PAGE.
Bowyer v. Cook , 4 C. B. 236..... 387	Burkam v. Burk , 98 Ind. 270..... 50
Bowers v. Suffolk Manuf. Co. , 4 Cush. 322, 340..... 145	Burkhart v. Howard , 14 Oreg. 39..... 317
Dodd v. Cleveland , 4 Pick. 525..... 798	Burke v. Schwerdt , 5 W. C. Rep. 880..... 573
Bricheno v. Thorp , Jacob, 200..... 530	Burnell v. N. Y. Cent. R. Co. , 45 N. Y. 184; 6 Am. Rep. 65..... 471
Branson v. Labrot , 81 Ky. 638; 50 Am. Rep. 183..... 389	Burns v. Burns , 18 Fla. 369..... 672
Bryan v. Cattell , 15 Iowa, 538..... 314	Burr v. Burr , 2 Casey, 284..... 744
Brinkerhoff v. Lawrence , 2 Sand. Ch. 405..... 288	Bury v. Bedford , 4 De G., J. & S. 362; 389, 370..... 151
Brown v. Jacquette , 94 Penn. St. 113; 39 Am. Rep. 770..... 101	Rush v. Lathrop , 22 N. Y. 535..... 493, 494
Bradshaw v. Warner , 54 Ind. 58..... 385	Bussinger v. Bank, etc. , 30 N. W. Rep. 290..... 855
Brouwer v. Jones , 23 Barb. 153..... 398	Butler v. O'Brien , 5 Ala. 316..... 582
Bryan v. Wash. , 2 Gilw. 557..... 243	Butler v. State , 97 Ind. 373..... 381
Brown v. Perkins , 42 Mich. 501..... 225	Butler and Baker's case , 3 Rep. 35..... 291
Bray v. Ketell , 1 Allen, 80..... 199	Butler v. Penn. , 10 How. 402..... 169
Brashear v. West , 7 Pet. 608, 615, 674..... 762	Buttrick v. Lowell , 1 Allen, 172; 7 Am. Dec. 721..... 868
Brewer v. Weakley , 2 Overton (Tenn.) 90..... 687, 692	Butz v. City of Muscatine , 8 Wal. 575..... 276
Bradley v. Denton , 3 Wis. 557..... 611	Byars v. Spencer , 101 Ill. 429..... 294
Bradberry v. State , Tex. Ct. App. Nov. 13, 1888..... 568	Byers v. McClanahan , 6 Gill. & J. 56..... 283
Brown v. State , 2 Tex. Ct. App. 115..... 657	Byrd v. Boyd , 4 McCord, 246; 1 Am. Dec. 740..... 829
Brown v. State , 6 Tex. Ct. App. 286..... 657	Byrne v. N. Y. C. & H. R. R. Co. , 83 N. Y. 620..... 511
Brown v. Swineford , 44 Wis. 282..... 651	Byrne v. Van Tierhoven , 5 C. P. Div. 344; 30 Moak's Eng. Rep. 833..... 779
Brush v. Ware , 15 Pet. 93-113..... 590	
Bradshaw v. South Boston R. Co. , 125 Mass. 407..... 863	Cable v. Cable , 89 N. C. 589..... 454
Bremmer v. Railway Co. , 61 Wis. 114..... 651	Cady v. Conger , 19 N. Y. 256, 281..... 144
Branson v. Coffin , 108 Mass. 175; 11 Am. Rep. 335..... 627, 628	Cahill v. Eastman , 18 Minn. 324; 10 Am. Rep. 184-200..... 557
Brown v. Chicago, M. & St. P. R. Co. , 54 Wis. 342; 41 Am. Rep. 41..... 610	Cairo, etc., Co. v. Stephens , 78 Ind. 278, 283; 38 Am. Rep. 199..... 25
Bright v. Carpenter , 9 Ohio, 139; 34 Am. Dec. 432..... 841	Cain v. Goda , 94 Ind. 555..... 25
Brock v. Hidy , 13 Ohio St. 310..... 812	Cain v. Ingham , 7 Cow. 478..... 475
Bradlee v. Whitney , 108 Penn. St. 382..... 713	Calder v. Smalley , 66 Iowa, 219; 55 Am. Rep. 270..... 568
Brown v. Hannibal, etc., R. Co. , 33 Mo. 309..... 704	Camden, etc., Steam Ferry Co. v. Monaghan (Penn.) , 10 W. N. Cas. 47..... 115
Brown v. Ashley , 16 Nev. 317..... 562	Cammack v. Lewis , 15 Wall. 643..... 856, 857
Branch v. Levy , 46 Super. Ct. 428..... 521	Campbell v. Dent , 54 Mo. 325..... 102
Brown v. Lunt , 37 Me. 423..... 443	Campbell v. Laclede Gas Co. , 81 Mo. 332..... 93
Brown v. Dunham , 1 Root, 272..... 56	Candee v. W. U. Tel. Co. , 34 Wis. 471; 17 Am. Rep. 452..... 610
Bradstreet v. Everson , 72 Penn. St. 124; 15 Am. Rep. 685..... 731	Cane v. Mosler , 4 Penn. St. 264..... 642
Brown v. Dempsey , 95 Penn. St. 243..... 713	Canton v. Hildeout , 1 Mac. & G. 599..... 232
Brechbill v. Randall , 102 Ind. 528; 52 Am. Rep. 695..... 41, 42	Carl v. Railroad Co. , 48 Wis. 625..... 203
Bryan v. Wash. , 2 Gilw. 557..... 288	Carlton v. Baldwin , 22 Tex. 724..... 675
Bridges v. Hinde , 16 Md. 104..... 760, 761	Carman v. Newell , 1 Denio, 25..... 475
Briggs v. McCabe , 27 Ind. 327..... 55	Carpenter v. Carpenter , 45 Ind. 142; 56, 57
Brown v. European, etc., Ry. Co. , 54 Mo. 284..... 389	Carpenter v. Comm. , 17 How. 456..... 504
Broughton v. Broughton , 1 Atk. 625..... 295	Carpenter v. Sheldon , 4 N. Y. 579..... 666, 667
Brack v. Milligan , 10 Ohio, 121..... 246	Carr v. Dooley , 119 Mass. 294..... 136, 137
Brown v. State , 52 Ala. 338..... 672	Carr v. Kolb , 99 Ind. 55..... 147
Brakken v. Minn., etc., Ry. Co. , 29 Minn. 41..... 147	Carr's Adm. v. Hurlbut's Admx. , 41 Mo. 284..... 750
Bradley v. White , 10 Metc. 308; 43 Am. Dec. 425..... 101	Carr v. Crafts , 53 Cal. 135..... 561
Brittain v. Work , 13 Neb. 317..... 288	Carroll v. Burns , 15 Weekly Notes of Cas. 553; 55 Am. Rep. 778..... 429
Brown v. Brown , 66 Me. 316..... 284	Carter v. Dale , 3 Lea. 710; 31 Am. Rep. 860..... 754
Buchanan v. Curtis , 25 Wis. 99..... 147	Carter v. State , 12 Tex. 500..... 641
Ruck v. Martin , 21 S. C. 592..... 257	Carroll v. Siebenthaler , 27 Cal. 193..... 313
Buckridge v. Glasse , Cr. & Ph. 137..... 282	Carson v. Godley , 26 Penn. St. 111; 67 Am. Dec. 401..... 572
Buel v. Sely , 5 Ill. App. 116..... 105	Carter v. Hobbs , 12 Mich. 52..... 787, 788
Bullem v. Hiatt , 12 Kans. 98..... 564	Carter v. Towne , 98 Mass. 587..... 389
Bullen v. Sharp , L. R. 1 C. P. 86..... 99, 100	Cary v. State , 76 Ala. 78..... 440
Bunch v. Edenton , 90 N. C. 131..... 528	Carter v. State , 56 Ga. 463..... 432
Bundy v. Town of Monticello , 84 Ind. 119, 131..... 64	Catts v. Phalen , 2 How. 376..... 765
Bunn v. Whitthrop , 1 Johns. Ch. 329, 298..... 295	Carwon v. R. Co. , 4 Ohio St. 417, 418..... 557
Burbank v. Crooker , 7 Gray, 153..... 386	Case v. Case , 17 Cal. 598..... 672
Burkle v. Eckhardt , 1 Den. 341; 3 N. Y. 132..... 101	Case v. Aberly , 1 Paige, 398..... 586
Burdick v. Cheadle , 26 Ohio St. 393; 20 Am. Rep. 767..... 68	Case v. Johnson , 91 Ind. 477..... 43
Burk v. State , 8 Tex. Ct. App. 336..... 657	Casey v. N. Y. C. & H. R. R. Co. , 78 N. Y. 518..... 567
	Caswell v. District , 15 Wend. 379..... 108

TABLE OF CASES CITED.

	PAGE.		PAGE.
Caswell v. Gibbs, 33 Mich. 392	392	City of Philadelphia v. Rink, 2 Atl. Rep. 506	312
Catlin v. Scoulding, 6 T. R. 189	452	City of Shrewsport v. Levy, 26 La. Ann. 671	770
Cauley v. Pittsburgh, etc., Ry. Co., 95 Penn. St. 396; 40 Am. Rep. 664	397	City of Wyandotte v. Gibson 25 Kans. 236	529
Central Branch R. v. Fritz, 20 Kans. 434	394	Clapp v. Sampson, 94 U. S. 599	504
Central Union Tel. Co. v. Bradbury, 106 Ind. 1	41	Clark v. Allen, 11 R. I. 439; 23 Am. Rep. 496	849, 856, 857
Chamberlain v. Chamberlain, 71 N. Y. 423	673	Clark v. Baker, 5 Met. 452	127
Chamberlain v. McCallister, 6 Dana, 563	627	Clark v. Clark, 20 Ohio St. 128	95
Chamberlain v. Morgan, 6 Penn. St. 165	827	Clark v. Durand, 12 Wis. 223	849, 857
Chamberlaine v. Reed, 13 Me. 357; 30 Am. Dec. 506	737	Clark v. Leupp, 38 N. Y. 223	427
Chancellor v. Windham, 1 Rich. 104; 42 Am. Dec. 411	251	Clark v. Manufacturers' Ins. Co., 2 Woodb. & M. 472	782
Champion v. Griffith, 13 Ohio, 228	841	Clark v. Martin, 49 Penn. St. 239	357
Chapin v. Marlborough, 9 Gray, 244	195	Clark v. Smith, 52 Vt. 629	101
Chapman v. Kirby, 49 Ill. 211	613	Clark v. State, 8 Tex. Ct. App. 350	641
Charles v. Cocker, 2 S. C. 136	261	Clark v. Van Court, 100 Ind. 113; 50 Am. Rep. 774	55
Charles River Bridge v. Warren Bridge, 11 Peters, 420	278	Clark v. Waltham, 128 Mass. 567	145
Charleston v. Benjamin, 2 Strob. 506	775	Clarke v. Holmes, 7 H. & N. 937	132
Chatterton v. Fox, 5 Duer, 64	646	Clark v. Jacques, 1 Beav. 36	533
Chester v. Browne, 55 Cal. 46	229	Classman v. Lacoste, 88 E. L. & E. 140	826
Chic., etc., R. Co. v. Patchin, 16 Ill. 198	701	Clavering v. Clavering, 2 Vern. 473	295
Chicago, etc., Ry. Co. v. Smith, 46 Mich. 504; 41 Am. Rep. 177	396	Clay v. Edgerton, 19 Ohio St. 549	842
Chicago, etc., R. Co. v. Stumps, 69 Ill. 409	398	Clayards v. Dethick, 12 Q. B. 439	116
Chilton v. Braidon, 2 Black. 458	316	Clayton v. Johnson, 36 Ark. 406; 3 Am. Rep. 40	759, 760, 762
Chitman v. Tucker, 38 Wis. 43; 20 Am. Rep. 1	50	Clayton v. Johnston, 36 Ark. 406; 38 Am. Rep. 30	674
Cholmondeley v. Clinton, 19 Ves. 261	552	Clayton v. Wardell, 4 N. Y. 230; 5 Barb. 214	672
Coop. 80	552	Clegg v. Dearden, 12 Q. B. 576	342
Choate v. Thompson, 2 Ohio St. 144	417	Cleveland v. N. J. Steamboat Co. 68 N. Y. 306	116
Christian v. Crocker, 35 Ark. 327	101	Cleveland v. Newsome, 45 Mich. 62	569
Christie v. Griggs, 2 Camp. 79. 693, 699	700	Cleveland v. Speilman, 25 Ind. 65	73, 74
	703	Cleveland v. Steamboat Co., 68 N. Y. 306	525
Churton v. Douglas, Johns. Eng. 184	164	Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 202	834
Church v. Bull, 2 Den. 430; 43 Am. Dec. 754	495	Cline v. Jones, 111 Ill. 563	233
Chynoweth v. Tenney, 10 Wis. 397	51	Clintkeales v. Hall, 15 S. C. 602	259
Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474; 48 Am. Rep. 179	394	Cobb v. Farr, 16 Gray 597	219
Cincinnati, etc., R. Co. v. Hiltzhauer, 99 Ind. 458	24	Cobb v. Wanemaker, 73 Penn. St. 501	591
Cincinnati v. White, 6 Pet. 431	144	Cockburn v. Ashland Lumber Co., 54 Wis. 619	610
City v. Lamson, 9 Wall. 477	276	Coffin v. City of Portland, 27 Fed. Rep. 418	300
City of Chicago v. Evans, 24 Ill. 52	389	Colt v. Comstock, 51 Conn. 352; 50 Am. Rep. 22	600
City of Chicago v. Hesling, 63 Ill. 204; 35 Am. Rep. 378	69	Cole v. Bartlett, 4 La. 130	734
City of Chicago v. Major, 13 Ill. 349	69	Cole v. McKey, 66 Wis. 500; 57 Am. Rep. 293	598
City of Chicago v. Rumpf, 45 Ill. 96	618	Cole v. Newburyport, 129 Mass. 594	898
City of Chicago v. Starr, 42 Ill. 174	399	Cole v. Van Riper, 44 Ill. 53	756
City of Cincinnati v. White, 6 Pet. 432	501	Coles v. Sims, Kay, 56	395
City of Crawfordville v. Bond, 96 Ind. 246	23	Coleman v. State, 63 Ala. 98	441
City of Kansas v. (case extended to p. 85, 85 not given)	84	Coleman v. King, 19 Week. Dig. (Sup. Ct. Gen. Term), 403	606
City of Clinton v. Cedar Rapids & Miss. R. Co. 24 Iowa, 456	301, 302	College of Physicians v. Levett, 1 Ld. Raym. 472	402
City of Evansville v. Decker, 84 Ind. 325; 43 Am. Rep. 86	23	Collins v. Buckeye Fire Ins. Co., 17 Ohio St. 215	831
City of Harrisburgh v. Schoeck, 104 Penn. St. 51	742	Collins v. Collins, 40 Ohio St. 353	427
City of Indianapolis v. Emmelman, 108 Ind. 630	396	Combs v. State, 73 Ind. 221	655
City of Indianapolis v. Huffer, 30 Ind. 235	23	Commercial Fire Ins. Co. v. Allen, Ala. Sup. Ct. Jan. 31, 1887	648
City of Kokomo v. Mahan, 100 Ind. 242	24	Comrs v. Lahey, 14 Gray, 62	532
City of Logansport v. Wright, 25 Ind. 512	24	Comrs v. Merriam, 14 Pick. 518	532
City of North Vernon v. Voegler, 103 Ind. 314	23	Comrs v. Nichols, 114 Mass. 235; 25 Am. Dec. 420	532
City of New Haven v. Sargent, 38 Conn. 50; 9 Am. Rep. 380	501	Com. v. Denamore, 12 Allen, 635	185
City of Philadelphia v. Given, 60 Penn. St. 136	313	Com. v. Hackett, 2 Allen, 136	566
		Com. v. Haskell, 2 Brewst. (Penn.) 491	642
		Com. v. Hyneman, 101 Mass. 30	774
		Com. v. Wolf, 3 Serg. & R. 48	774
		Com. v. McPike, 3 Cush. 181	183, 185

TABLE OF CASES CITED.

xxi

	PAGE.		PAGE.
Com. v. Odell, 3 Pittab. 442.....	688	Crisler v. Garland, 2 S. & M. 126	663
Com. v. Taylor, 36 Penn. St. 283.....	161	Crocker v. Getchell, 23 Me. 302; 23 Am.	
Com. v. Willard, 22 Plo. 476	219	Dec. 499	799
Com. v. Abbott, 18 Met. 120.....	128	Crowe v. Peters, 63 Mo. 439.....	208
Com. v. Alger, 7 Cush. 84	774	Culley v. Edwards, 44 Ark. 423; 61 Am.	
Com. v. Baxter, 35 Penn. St. 263.....	87	Rep. 614	109
Com. v. Butler, 119 Mass. 317.....	132	Cumberland, etc., Co. v. Hitchings, 65	
Com. v. Clap, 4 Mass. 163, 680, 687, 688,	691	Me. 140	337
Com. v. Downing, 4 Gray, 29.....	219	Cummins v. City of Seymour, 79 Ind.	
Com. v. Egan, 4 Gray, 18, 20.....	128	491; 41 Am. Rep. 618	23
Com. v. Erie & Northeast R. Co., 27		Cummings v. Kent, 44 Ohio St. 92.....	833
Penn. St. 354	802	Currier v. Cont. Life Ins. Co., 63 Am.	
Com. v. Flak, 8 Met. 233, 243	144	Rep. 131	855, 856
Com. v. Freedley, 21 Penn. St. 83	604	Curry v. Fowler, 87 N. Y. 83; 41 Am.	
Com. v. Gee, 6 Cush. 174	128	Rep. 343	101, 102, 108
Com. v. Has, 123 Mass. 40	771, 774	Curtin v. Patton, 11 Serg. & R. 306.....	56
Com. v. Metropolitan R. Co., 107 Mass.		Curtis v. Mussey, 6 Gray, 261	680, 687
236	141	Curtis v. Whitney, 13 Wall. 68	278
Com. v. Mosler, 4 Penn. St. 266.....	643	Cushing v. Blake, 30 N. J. Eq. 689.....	754
Com. v. Nye, 7 Gray, 816	135	Cushing v. Longfellow, 26 Me. 306.....	363
Com. v. O'Neill, 6 Gray, 843.....	128	Cutler v. Rae, 7 How. 729	736
Com. v. Rush, 14 Penn. St. 186.....	144	Cyr v. Dufour, 68 Mo. 452	147
Com. v. Slocum, 14 Gray, 395.....	132		
Com. v. Taylor.....	644	Daily v. City of Worcester, 131 Mass.	
Com. v. Thrasher, 11 Gray, 55.....	128	453	530
Connecticut M. L. Ins. Co. v. Shaffer,		Daily Post Co. v. McArthur, 16 Mich.	
94 C. N. 457	854, 855,	447	363
Connell v. Reed, 128 Mass. 477; 35 Am.		Dair v. United States, 16 Wall. 1.....	225
Rep. 397	150	Dalbaco v. Dalbiac, 16 Ves. Jr. 126.....	262
Conrad v. Lane, 26 Minn. 389; 87 Am.		Dalby v. India Ass. Co., 15 C. B. 345.....	856
Rep. 413	56	Daley v. Norwich, etc., R. Co., 20 Conn.	
Conroy v. Vulcan Iron Works, 63 Mo. 39,	122	591; 68 Am. Dec. 413.....	397
Continental Nat. Bank v. Nat. Bank, 50		Dalton, Ex parte, 5 N. E. Rep. 136.....	340
N. Y. 573	51	Dalton v. State, 43 Ohio St. 652.....	805
Continental Passenger Ry. Co. v. Swain,		Dana v. Lull, 17 Vt. 390.....	760, 761
Penn. Sup. Ct., Jan. 1883.....	116	Daniels v. Grover, 54 Iowa, 319.....	226
Cook v. Brown, 31 N. H. 460.....	238,	Daniels v. Owens, 70 Ala. 297	546
Cook v. Harris, 61 N. Y. 448.....	14	Daniels v. Ry. Co., 41 Iowa, 52.....	226
Cook v. Martin, 28 Conn. 63.....	750	Danner's Case, 4 Rich. 329.....	698, 703, 704
Cook v. Platt, 98 N. Y. 81.....	499		
Cook v. Weirman, 51 Iowa, 561.....	47	Dargan v. Waring, 11 Ala. 988.....	582
Cooper v. Ord, 60 Mo. 423.....	93, 95	Darling v. Wilson, 60 N. H. 59; 49 Am.	
Cooper v. State, 24 Wend. 443.....	606	Rep. 305	231
Cooper v. Young, 23 Ga. 209; 58 Am.		Darlington v. New York, 31 N. Y. 164,	
Dec. 608	436	167, 188.....	863
Co-operative Life Ass'n of Miss. v. Lef-		Dartmouth College Case, 4 Wheat. 519,	301
lore, 63 Miss. 1.....	783	Daughdrill v. Alabama Life Ins. Co., 31	
Corcoran v. B. & A. R. Co., 133 Mass.		Ala. 91.....	618
507	225	Davidson v. Duncan, 7 E. & B. 229.....	678, 679, 683
Coos Bay Wagon Road Co. v. Crocker,			550
6 Saw. 574.....	317	Davis v. Clough, 8 Sim. 263	8
Cordell v. N. Y. C. & H. R. R. Co., 76		Davis v. Davis, 26 Cal. 23.....	8
N. Y. 810; 28 Am. Rep. 650	229	Davis v. Randall, 115 Mass. 547; 15 Am.	
Cork & Y. Ry. Co., In re, L. R., 4 Ch.		146	799
App. 748	836	Davis v. Shepatone, Priv. Co., 55 L. T.	
Cothran v. Marmaduke, 60 Tex. 370.....	101	Rep. (N. S.) 1.....	689
Coston v. King, 2 F. Wms. 358.....	29	Davis v. Lowell, 77 Ala. 263.....	585
Cotton v. State, 31 Miss. 604.....	236	Davis v. Williams, 67 Miss. 843.....	280
Cottrell v. Babcock Printing Press Co.,		Dawson v. Small, L. R. 18 Eq. 114.....	599
64 Conn. 123.....	154	Day v. Stevens, 88 N. C. 83; 43 Am. Rep.	
Cottrill v. C. M. and St. P. Ry. Co., 47		732	101
Wis. 634; 32 Am. Rep. 793.....	494	Day v. Thompson, 65 Ala. 269.....	799
Couch v. Ryan, 68 Ala. 214.....	299	Dean v. Roessler, 1 Hilton, 422.....	607
Coulter v. Express Co., 66 N. Y. 535.....	519	Deardoff v. Foreman, 24 Ind. 481.....	623
County Com'r's v. King, 13 Fla. 451.....	161	De Jarnette v. Commonwealth, 75 Va.	
County Treasurer v. Dike, 20 Minn. 363,	341	667.....	642
Cwrdre v. Vandenberg, 101 U. S. 573,	423	Delavigne v. United Ins. Co., 1 Johns.	
Cweta Falls Manuf. Co. v. Rogers, 19		Cas. 310	784
Ga. 417; 65 Am. Dec. 602.....	438	Del. Lack. & West. R. Co. v. Salinan,	
Cykendall v. Durkee, 13 Hun, 260.....	149	39 N. J. Law, 600; 23 Am. Rep. 414.....	257
Corley v. Com., 104 Penn. St. 117.....	610	Dellet v. Whitner, Chev. Eq. 223.....	101
Cox v. Hickman, 8 H. L. C. 268.....	99,	Deming v. Cobbett, 6 Metc. 62.....	428, 429
Crane v. Boston, 13 Rep. 650.....	842	Den v. Emans, Penn. (N. J.) 967.....	606
Cutter v. Powell.....	828	Denison v. Ford, 10 Daly. 412.....	380
Craus v. Dwyer, 9 Mich. 350.....	866	Dennett, In re, 32 Me. 508.....	139
Crawford v. Bertholt, Saxton (N. J.) Ch.		Dennick v. Railroad, 103 U. S. 11.....	499
436	895	Denniston v. Clark, 125 Mass. 216.....	106
Cread v. Penn. R. Co., 36 Penn. St. 139;		Denny v. Cabo, 6 Metc. 82.....	127
27 Am. Rep. 693	166	Denny v. Williams, 5 Allen, 1, 4.....	

TABLE OF CASES CITED.

PAGE.	PAGE.		
Denpree v. Denpree, 45 Ga. 414	474	Dwinell v. Stone, 30 Me. 364	101, 197
Denver, etc., Ry. Co. v. Chandler, 8 Colo. 371	704	Dye v. Scott, 35 Ohio St. 194; 35 Am. Rep. 604	796
De Peyster v. Michael, 6 N. Y. 467; 57 Am. Dec. 470	430	Dyer v. Brannock, 66 Mo. 423; 37 Am. Rep. 359	87, 96, 90
Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 503; 24 Am. Rep. 756	380	Dyer v. Whitman, 66 Penn. St. 435	614
Devereux v. Taft, 20 S. C. 556	239	Dyson v. Bradshaw, 33 Cal. 538	50
Devine v. Home Ins. Co., 32 Wis. 471, 477	873	Eager v. Crawford, 76 N. Y. 97	101, 102
Devlin v. O'Neill, 6 Daly, 306	386	Eari v. De Hart, 1 Beasley, 360; 72 Am. Dec. 395	26
Dexter v. Gardner, 7 Allen, 243	594	East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503	399
Dexter v. Manley, 4 Cush. 14	604, 607	Eastman v. Clark, 53 N. H. 376; 16 Am. Rep. 192	101, 106
Dickenson v. Burke, 25 Ga. 226	655	East Tenn., etc., R. Co. v. Baylies, 74 Ala. 150	704
Dickerson v. Colgrove, 100 U. S. 578	51	East Tennessee, etc. R. Co. v. St. John, 5 Sneed. 524	394
Dilleber v. K. L. Ins. Co., 76 N. Y. 567	878	Eaton v. Delaware R. Co., 57 N. Y. 385; 15 Am. Rep. 513	165, 166
Dixon v. Bell, 5 M. & S. 196	389	Eberman v. Reitzel, 11 Watts & S. 181	765
Dobbins v. Duquid, 65 Ill. 464	604	Eckstein v. Frank, 1 Daly. 334	56
Doe v. Gallini, 5 B. & Ad. 621	428	Edsall v. Brooks, 17 Abb. Pr. 221	687
Doe v. Jackman, 5 Ind. 283	437, 431	Edward v. Tracy, 62 Penn. St. 374	101
Doe v. Knight, 6 Barn. & C., 67 Ll. 284	285	Edwards v. N. Y., etc., R. Co., 96 N. Y. 245; 50 Am. Rep. 559	568
Doe, ex dem. Moore, v. Abernathy, 7 Blackf. 442	409	Edwards v. Sanders, 6 S. C. 316. 274, 276	277, 278
Doe v. Pitcher, 6 Taunt. 359	598, 599	Effinger v. Lewis, 32 Penn. St. 367	745
Doehler's Appeal, 64 Penn. St. 9	432	Egerton v. Browalew, 4 H. L. Cas. 160, 161	555
Doherty v. Dolan, 68 Me. 87	605	Elcheiberger v. Old Nat'l Bank, 103 Ind. 401	46
Doherty v. Perry, 38 Ind. 15	45	Eichford v. Evans, 56 Miss. 18	750
Dolan v. Mayor, 68 N. Y. 274; 23 Am. Rep. 168	314	Elkins v. McKean, 79 Penn. St. 493	567
Domestic S. M. Co. v. Arthurhultz, 63 Ind. 322	385	Elmer v. Sand Creek Tp., 38 Ind. 56	28
Donahoe v. Richards, 38 Me. 379; 61 Am. Dec. 256	34	Ellcott v. Barnes, 31 Kans. 170, 173	64
Donald v. Hewitt, 33 Ala. 534	584	Elliott v. Philadelphia, 75 Penn. St. 124; 39 Am. Rep. 771	398
Donnell v. Harsh, 67 Mo. 243	101, 107	Ellis v. Lewis, 7 Hare, 310	497
Donnell v. Harsh, 67 Mo. 170	98	Ellis v. P. & R. R. Co., 3 Ired. 104	700, 706
Donnelly v. State, 2 Dutch. 468	543	Ellis v. Welch, 6 Mass. 246	416
Doran's Case, 2 Pars. Eq. Cas. (Penn.), 467	220	Ellison v. Ellison, 6 Ves. 656	480
Dorsett v. Gray, 98 Ind. 273	37	Elmore v. Overton, 104 Ind. 548; 54 Am. Rep. 343	403
Dorsey v. Smyth, 38 Cal. 21	312	Emans v. Westfield, 97 Mass. 230	105
Dorsey v. St. Louis Railroad Co., 18 Ill. 65	628	Emmens v. Elderton, 4 H. L. 645	826
Doty v. Martin, 32 Mich. 463	396	Engelen v. Hilger, 43 Iowa, 568	214
Dougan v. Champlain Trans. Co., 56 N. Y. 1	525	Enos v. Tuttle, 3 Conn. 250	194
Douglas v. State, 31 Ind. 429	312	Ensley v. Nashville, 58 Tenn. 144	368
Dowling v. N. Y. C. & H. R. R. Co., 90 N. Y. 670	511	Enslow v. Cramer, 47 Wis. 699	685
Drake v. Baker, 34 N. J. L. 358	603	Epp's case, 19 Ga. 102, 118, 119	496
Drake v. Hudson River R. Co., 7 Barb. 509	302	Erben v. Lorillard, 19 N. Y. 299	544
Drake v. Klely, 93 Penn. St. 493	393	Erwin v. Clark, 13 Mich. 10	393
Drake v. Rogers, 6 Mo. 317	675	Evans v. Davidson, 53 Md. 245; 36 Am. Rep. 400	377
Driggs v. Dwight, 17 Wend. 71	607	Evans v. Hardy, 76 Ind. 527	37
Dry v. Boswell, 1 Camp. 329	107	Evans v. Merriken, 8 Gill & J. 39	231
Duer v. James, 42 Md. 493	288	Evans v. Welch, 63 Ala. 250	562
Duggan v. Bliss, 4 Col. 223; 34 Am. Dec. 80	675	Evansich v. Gulf, etc., Ry. Co., 57 Tex. 128; 44 Am. Rep. 596	399
Duke v. Beeson, 79 Ind. 24, p. 31	416	Evansville, etc., R. Co. v. Griffin, 100 Ind. 221; 50 Am. Rep. 738	67, 68, 399
Dunbar v. Rawles, 28 Cal. 225	385	Evansville Gas-light Co. v. State, 73 Ind. 219; 33 Am. Rep. 129	416
Duncan v. City of Terre Haute, 85 Ind. 104	416	Everhart v. Terre Haute, etc., R. Co., 73 Ind. 292; 41 Am. Rep. 567	399
Duncan v. Jordan, 15 Wall. 165	590	Eviston v. Cramer, 47 Wis. 659	675, 680
Duncombe v. Daniel, 8 C. & P. 232. 680	683	Express Printing Co. v. Copeland, 64 Tex. 354	688
Dunham v. Kirkpatrick, MS	721	Eyre v. Jacobs, 14 Gratt. 432; 73 Am. Dec. 367	504
Dunlap v. Higgins, 1 H. L. Cas. 381, 778	779	Fairchild v. N. E. Mut. L. Ass'n, 51 Vt. 625	849, 853
Dunlap v. Wagner, 85 Ind. 529; 44 Am. Rep. 42	394	Farmer's, etc., Bank v. King, 67 Penn. St. 202	64
Dunn v. Grand Trunk Railway, 58 Me. 187; 4 Am. Rep. 267	165, 166		
Dunn v. People, 109 Ill. 635	644		
Dupont de Nemours v. Vance, 19 How. 62	786		
Durgin v. Lowell, 3 Allen, 398, 400	145		
Durr v. State, 59 Ala. 24	594		
Dwight v. Hamilton, 118 Mass. 175	153		

TABLE OF CASES CITED.

xxiii

PAGE.	PAGE.
Farmers & Traders' Bank v. Lucas , 26 Ohio St. 385..... 622	Fox v. Washington Territory , 5 N. C. Rep. 339..... 402
Farrar v. Bridges , 5 Humph. 411..... 226	Freburg v. Davenport , 63 Iowa, 119..... 232
Farrand v. Marshall , 19 Barb. 381-385..... 557	Freed v. Brown , 85 Ind. 810 (317)..... 430
Favorite v. Deardorn , 84 Ind. 555..... 416	Freeland v. Charnley , 80 Ind. 122..... 50
Fears v. Brooks , 12 Ga. 195..... 694, 696	Freeman v. Colt , 96 N. Y. 63..... 437
Fent v. T. P. Ry. Co. 59 Ill. 362; 14 Am. Rep. 13..... 792, 794, 795	Freeman v. Flood , 16 Ga. 523..... 694
Ferguson v. State , 49 Ind. 33..... 651, 653, 655	Freeman v. Stewart , 41 Miss. 138..... 559
Ferriter v. Tyler , 48 Vt. 444; 21 Am. Rep. 133..... 84	French v. Neacale , 2 Drury & War. 299..... 306
Ferry v. Henry , 4 Pick. 75..... 106	Friesmuth v. Agawam Mutual Fire Ins. Co. , 10 Cush. 587..... 732
Filer v. N. Y. Cent. R. Co. , 49, N. Y. 47..... 116, 122	Frollickstein v. Mayor of Mobile , 40 Ala. 725..... 771, 774
Finch v. Gridley , 25 Wend. 469..... 402	Frost v. Benough , 1 Bing. 206..... 751
Finney v. Cochran , 37 Am. Dec. 450..... 593	Fry v. State , 63 Ind. 532..... 41
First Cong. Church v. City of Muscatine , 2 Iowa, 69..... 161	Fryer v. Kennerly , 15 C. B. (N. S.) 422..... 678
First Nat. Bank v. Dawson , 78 Ala. 67..... 623	Fuller v. McDonald , 8 Greenl. 212; 23 Am. Dec. 493..... 798, 799
Fisher v. City of Rochester , 6 Lans. 225..... 287	Fuller v. Yates , 8 Paige, 325..... 493, 497
Fisher v. Hall , 41 N. Y. 421..... 612	Fulton v. Fulton , 48 Barb. 591..... 298
Fisher v. People , 23 Ill. 233..... 56, 58	Fulton v. Stuart , 15 Am. Dec. 542..... 628
Fitts v. Hall , 9 N. H. 441..... 386	Funk v. Davis , 103 Ind. 231..... 73, 78
Fitzgerald v. Fuller , 19 Hun, 180..... 606	Funk v. Paul , 64 Wis. 35; 54 Am. Rep. 518..... 231
Fitzgibbons v. Freisen , 12 Daly (N. Y. Com. Pleas.) 419..... 81	Fulwider v. Ingels , 87 Ind. 414..... 407
Fitzpatrick v. Fitzpatrick , 26 Iowa 310..... 739	Furst v. Second Ave. R. Co. , 72 N. Y. 542..... 544
Fitzsimmons v. City of Brooklyn , 102 N. Y. 636; 55 Am. Rep. 335..... 310	Gabel v. City of Houston , 20 Tex. 235..... 771
Fraly v. Biepham , 10 Penn. St. 320; 51 Am. Dec. 426..... 102	Gale v. Kalamazoo , 23 Mich. 344; 9 Am. Rep. 80..... 618
Francis, In re , 2 Sawy. 236..... 854	Galea R. Co. v. Fay , 18 Ill. 538..... 189
Frank v. Mutual Life Ins. Co. , 103 N. Y. 236..... 854	Galloway v. Western & A. P. R. Co. , 57 Ga. 512..... 837
Franklin Mut. Life Ins. Co. v. Hazard , 41 Ind. 116; 13 Am. Rep. 313..... 857	Gallup v. Wright , 61 How. Pr. 296..... 74
Frazier v. Hightower , 12 Heish. 94..... 754	Galpin v. Chlo. , etc., R. Co., 19 Wis. 604..... 704
Frazier, In re , 32 N. Y. 239..... 497	Gandell v. Pontigny , 4 Camp. 375..... 823, 826
Folsom v. New Orleans , 32 La. Ann. 714..... 170	Gandy v. Jubber , 5 Best & S. 73, 485..... 571
Fondavilla v. Jourgensen , 33 Super. Ct. 461..... 606	Gannon v. Harzadon , 10 Allen, 106..... 232
Font v. Aetna Fire Ins. Co. , 61 N. Y. 551..... 783	Ganous v. Knight , 5 Barn. & Cress. 671..... 294
Font v. Village of Green Island , 23 Week. Dig. 534..... 146	Gans v. St. P., F. & M. Ins. Co. , 43 Wis. 103..... 873
Fletcher v. Holmes , 32 Ind. 497..... 416	Gardenshire v. Smith , 39 Ark. 230..... 101
Fletcher v. Peck , 6 Cranch, 87..... 53	Gardner v. Gardner , 1 Giff. 126..... 283
Fletcher v. Rylands , L. R. 1 Exch. 253; L. R. 3 H. L. Cas. 330..... 231, 537	Garr v. Hedman , 8 Cal. 574..... 106
Mourney v. City of Jeffersonville , 17 Ind. 169..... 403	Garr v. Seiden , 4 N. Y. 94..... 579
Flournow v. Wooten , 71 Ga. 103..... 456	Gathright v. Burke , 101 Ind. 590..... 26
Flureau v. Thornhill , 2 W. Bl. 1073..... 602	Gaulden v. State , 11 Ga. 47..... 550, 553
Flureau v. Thornhill , 2 W. Bl. 1073..... 610	Gavin v. City of Chicago , 97 Ill. 66; 37 Am. Rep. 99..... 829
Flyn v. State , 43 Ark. 289..... 187	Gay v. Winter , 34 Cal. 153..... 229
Forbes v. Am. Mut. L. Ins. Co. , 15 Gray, 249..... 852	Gelley v. Clerk , Cro. Jac. 189..... 787
Ford v. Chicago & N. W. R. Co. 14 Wis. 616..... 302	Gelpcke v. Dubuque , 1 Wall. 175..... 276
Ford v. Clark , 72 Ga. 769..... 456	Gerhardt v. Swaty , 57 Wis. 37..... 876, 877
Ford v. Fitchburg Railroad Co. , 110 Mass. 240; 14 Am. Rep. 598..... 125, 725	Gibson v. Spear , 34 Vt. 311..... 56
Ford v. White , 16 Beav. 130..... 492	Gibson v. Tyson , 5 Watts 31..... 721
Forman v. Proctor , 9 B. Mon. 124..... 231	Gibson v. Erie R. Co. , 93 N. Y. 453; 20 Am. Rep. 532..... 893
Fort v. West , 53 Ga. 564..... 474	Gibson v. Stone , 43 Barb. 235; 28 How. Pr. 468..... 103
Forsythe v. Kimball , 91 U. S. 291..... 799	Gibson v. Gibson , 17 L. & Eq. 349..... 496
Forsyth v. Wells , 41 Penn. St. 291..... 362	Gilbert v. Fetelet , 33 N. Y. 163..... 395
Foster v. Bettsworth , 3 Iowa, 416..... 51	Gilbert v. Weisch , 73 Ind. 557..... 64
Foster v. Cook , 3 Bro. Ch. C. 347..... 497	Gilbert v. People , 1 Denio, 45; 43 Am. Dec. 646..... 577
Foster v. Gile , 50 Wis. 603..... 849	Gilbert v. Moore , 104 Penn. St. 74..... 857
Foster v. Moore , 32 Kans. 483..... 377	Giles v. O'Toole , 4 Barb. 261..... 607
Foster v. Scripps , 39 Mich. 376..... 678	Gillespie v. McGowan , 100 Penn. St. 144; 45 Am. Rep. 385..... 68
Fountain County, etc., Co. v. Beckiehelmer , 102 Ind. 71; 62 Am. Rep. 645..... 427	Gilliam v. Reddick , 4 Fred. 368..... 443
Fowler v. B. & O. R. , 18 W. Va. 579..... 184	Gilpin v. Anderby , 5 B. & Ald. 594..... 99
Fowler v. Fowler , 33 Beav. 616..... 599	Gilroy's Appeal , 100 Penn. St. 5..... 377
Fowler v. Merrill , 11 Hcw. 375 (306)..... 231	Gimbel v. Stolte , 59 Ind. 446..... 416
Fox v. Adams , 5 Me. 245..... 674	Glass v. Garber , 53 Ind. 336..... 614
Fox v. Scard , 33 Beav. 327..... 368	Glenn v. Farmers' Bank , 70 N. C. 191..... 47
	Goblet v. Beechey , 3 Sim. 42..... 74

	PAGE.		PAGE.
Godley v. Hagerty, 20 Penn. St. 387; 59 Am. Dec. 781.	572	Hanover R. Co. v. Coyle, 55 Penn. St. 408.	508
Golt v. Nat. P. Ins. Co., 23 Barb. 189.	573	Hanson v. McCue, 42 Cal. 306.	509
Gonzales v. Barton, 45 Ind. 236.	431	Hapgood v. Houghton, 10 Pick. 154.	817
Goodlett v. Kelly, 74 Ala. 213.	230	Harrison v. Bank, etc., 23 Ind. 133.	48
Goodman v. Pocock, 15 Ad. & Ell. (N.S.) 576.	826	Harris v. South Yorkshire Ry. Co., 4 Hurst. & Nov. 67.	68
Goodman v. Simonds, 20 How. 343.	39	Hardtke v. State, 67 Wis. 552.	655
Gordon v. Brewster, 7 Wis. 315.	329	Hardy v. Martin, 1 Cox, 26.	388
Gordon v. Tweedy, 14 Ala. 237-8.	441	Hardy v. Nelson, 27 Me. 635.	607
Goulden v. Comm., 1 De G. F. & J. 146.	683	Hargrave v. Conroy, 4 C. E. Green, 280.	106
Grace v. Smith, 2 W. Bl. 983.	99, 100, 104	Hargreaves v. Deacon, 25 Mich. 1.	63, 309
Graeter v. State, 106 Ind. 271.	404	Harkreader v. Clayton, 56 Miss. 383; 31 Am. Rep. 308.	50
Gramlich v. Wurst, 86 Penn. St. 74; 27 Am. Rep. 634.	68	Harlow v. Thomas, 15 Pick. 66.	137
Grand Rapids, etc., R. Co. v. Judson, 35 Mich. 507.	704	Harrison v. Baptist Church, 36 Ga. 180; 36 Am. Rep. 117.	356
Graves v. Anderson.	441	Harrington v. Churchward, 29 L. J. Ch. 251.	105
Graves v. State, 16 Vroom. 203.	432	Harris v. Columbiana County Mutual Ins. Co., 18 Ohio 116; 51 Am. Dec. 448.	784
Graves v. Thomas, 95 Ind. 301; 48 Am. Rep. 727.	69	Harris v. Ross, 36 Mo. 8.	87, 93
Gray v. Dryden, 70 Mo. 103.	93	Harrison v. Bush, 5 E. & B.	684
Gray v. St. Paul and P. R. Co., 13 Minn. 315.	302	Harrison v. Gardner, 10 Ala. 187.	525
Green v. Chelsea, 21 Pick. 71, 80.	146	Harrison v. McConkey, 1 Md. Ch. 34.	849
Green v. Greenbank, 2 Marsh. 435.	56	Harrison v. Sterry, 5 Cranch, 237.	278
Green v. Trieber, 3 Md. 11.	761	Harrower v. Heath, 19 Barb. 331.	108
Green v. Williams, 45 Ill. 203.	607, 613	Hart v. Kelley, 83 Penn. St. 286.	101
Greenleaf v. Ill. Cent. R. Co., 29 Iowa. 14.	229	Hartfield v. Roper, 21 Wend. 615; 34 Am. Dec. 273.	337, 510
Greenough's Appeal, 9 Penn. St. 18.	745	Hartley v. Crawford, 83 Penn. St. 478.	741
Gregory v. Lockyer, 6 Maddock, 80.	819	Harvey v. Childs, 28 Ohio St. 219; 22 Am. Rep. 387.	101, 103, 104
Gregory v. State, 94 Ind. 384; 48 Am. Rep. 162.	351	Harwood v. Root, 20 Fla. 953.	604
Griffin v. Fellows, 82 Penn. St. 114.	745	Haskell v. Jones, 86 Penn. St. 173.	41, 47
Griffin v. New York, 9 N. Y. 450; 61 Am. Dec. 700.	868	Hastings v. Lusk, 22 Wend. 410; 34 Am. Dec. 330.	573
Griffiths v. Earl Dudley, 9 Q. B. Div. 337; 44 Am. Rep. 633.	837, 838	Hatfield v. Sneden, 54 N. Y. 280.	755
Grimshaw v. Walker, 12 Ala. 101.	761	Hathaway v. Toledo, etc., Ry. Co., 46 Ind. 25.	392
Grinnel v. Cook, 3 Hill, 483; 38 Am. Dec. 663.	787	Havens v. Havens, 1 Sand. Ch. 324, 331.	493
Grissell v. Peto, 9 Bing. 1.	550	Hawkins v. Governor, 1 Ark. 570; 33 Am. Dec. 349.	380
Grissold v. Sheldon, 4 N. Y. 531, 501.	336	Hay v. Cohoes Co., 2 N. Y. 159-162; 51 Am. Dec. 279.	557
Grogan v. Hayward, 4 Fed. Rep. 161.	144	Hayden v. Stone, 112 Mass. 346, 351.	145, 148
Grover v. Wakeman, 11 Wend. 180; 25 Am. Dec. 624.	674, 675	Healey v. Batley, L. R. 19 Eq. 375, 392.	146
Gulliv v. Thomas, 54 Ala. 414; 25 Am. Rep. 707.	623	Heard v. Dubuque Co. Bank, 8 Neb. 10; 30 Am. Rep. 811.	45
Guthrie v. New Haven, 31 Conn. 308, 321.	146	Hearn v. Stowell, 12 A. & E. 719.	684
Gulf, etc., R. Co. v. Wallen, 35 Tex. 568.	648	Heaverlin v. Donnell, 7 Sm. & M. 244; 45 Am. Dec. 302.	799
Gulick v. Turnpike Co., 14 N. J. Law. 543.	452	Hedderich v. State, 101 Ind. 571; 51 Am. Rep. 769.	43, 403
Gunn v. Samuel, 31 Ala. 201.	818	Heeg v. Licht, 80 N. Y. 579-583; 36 Am. Rep. 634.	557
Gunnell v. Cockerill, 79 Ill. 493.	238	Helms v. Wayne, Agricultural Co., 73 Ind. 325; 38 Am. Rep. 147.	622
Gurnsey v. Pitkin, 32 Vt. 224.	34	Helphensteine v. Meredith, 84 Ind. 1.	416
Habergham v. Vincent, 2 Ves. Jr. 204.	674	Henderson v. Bliss, 8 Ind. 100.	790, 762
Habrey v. Whiting, 4 Mason, 206.	674	Hereth v. Merchants' Nat'l Bank, 34 Ind. 380.	45, 46
Hadley v. Barendale, 9 Exch. 341; 26 Eng. Law & Eq. 388.	610, 612	Herhold v. City of Chicago, 108 Ill. 467.	147
Hafner v. Irwin, 1 Ired. 490; 84 Am. Dec. 360.	675	Hern v. Nichols, 1 Salk. 289.	424
Haley v. Clark, 28 Ala. 439.	381	Herndon v. Moore, 18 S. C. 339.	275
Hall v. Allen, 37 Ind. 541.	46	Herrick v. Catley, 1 Daly. 513.	550
Hall v. Barrows, 4 De G. J. & S. 150.	151	Hestonville, etc. Ry. Co. v. Connell 88 Penn. St. 520; 32 Am. Rep. 473.	390
Hall v. Denison, 17 Vt. 310.	761	Heath v. Van Cott, 9 Wis. 516.	799
Hall v. Meriden, 48 Conn. 418, 431.	146	Heavernin v. Donnell, 7 S. & M. 244; 45 Am. Dec. 302.	833
Hallett v. Clematone, 110 Mass. 32.	106	Hewitt v. Charter, 16 Pick. 363.	402
Halsey v. Whitney, 4 Mason, 208.	762	Hexter v. Knox, 63 N. Y. 561.	614
Hamilton v. Eno, 81 N. Y. 116. 679, 681, 692.	692	Hey v. Philadelphia City, 81 Penn. St. 44; 22 Am. Rep. 731.	527
Hammer v. Schoenfelder, 47 Wis. 453.	610	Higbe v. Leonard, 1 Denio, 186.	475
Hammond v. Hammond, 55 Md. 578.	78	Higgins v. Graham, 51 Mo. 17.	101
Hancock v. Day, McMull. Eq. 49; 36 Am. Dec. 293.	257		
Hanke v. B. & C., 25 Minn. 213.	108		
Hanna v. Flint, 14 Cal. 73.	101		

TABLE OF CASES CITED.

XXV

	PAGE.
Higgins v. Jeffersonville, etc., R. Co., 52 Ind. 110.....	302
Higgins v. People, 58 N. Y. 377.....	585
Higgins v. Reynolds, 31 N. Y. 155.....	499
Hildreth v. McIntire, 19 Am. Dec. 61.....	442
Hileman v. Bouslaugh, 13 Penn. St. 344.....	433
	434
Hill v. Miles, 9 N. H. 14.....	578
Hills v. Miller, 3 Palae. 254.....	368
Hinkley v. Fourth Nat'l Bank, 77 Ind. 475.....	46
Hitchcock v. Lukens, 8 Port. 333.....	593
Hitz v. Nat. Bank, 111 U. S. 729.....	754
Hixon v. Lowell, 13 Gray, 59.....	367
Hixon v. Osborne, L. R. 1 Eq. 583.....	599
Hoar v. Wood, 3 Metc. 108.....	577
Hoare v. Graham, 3 Camp. 57.....	799
Hobbs v. Lowell, 19 Pick. 405.....	533
Hobbs v. Stauer, 62 Wis. 110.....	583
Hoboken Land Co. v. Hoboken, 36 N. J. L. 540, 545.....	145, 146
Hobson v. Lord, 22 U. S. 309.....	735, 736
Hockett v. State, 105 Ind. 250; 55 Am. Rep. 20.....	41, 42
Hockett v. Hockett, 108 Ind. 506.....	437
Hodges v. Manly, 25 Vt. 210.....	455
Hodgkins v. Rockport, 105 Mass. 475.....	34
Hodgson v. Scarlet, 1 Barr. & Ald. 233.....	573
Hogan v. C. P. R., 49 Cal. 128.....	10
Holbrook v. Oberne, 55 Iowa, 324.....	101
Holdam v. Cold Spring, 21 N. Y. 474, 146.....	147
Hollfield v. Robinson, 19 Ala. 419.....	599
Hollenbeck v. Berkshire Railroad, 9 Cush. 473.....	139
Hollman v. Johnson, 1 Cow. 391.....	765
Holme v. Hammond, L. R. 7 Exch. 218.....	99
Holmes v. Old Colony R. Co., 5 Gray, 58.....	101
Holmes v. Wilson, 10 Ad. & El. 503, 337.....	342
Hollock v. Insurance Co., 2 Dutch. 233.....	779
Holton v. McCormick, 45 Ind. 411.....	799
Home of the Friendless v. Rouse, 8 Wall. 430.....	618
Homer v. Thwing, 3 Pick. 492.....	56
Hooper v. Accidental D. Ins. Co., 5 Hurl. & N. 546.....	964
Hoover v. Peters, 15 Mich. 51.....	323
Hopkins v. Lee, 6 Wheat. 109.....	606
Hoppe v. People, 31 Ill. 335.....	645
Horeburg v. Baker, 1 Pet. 223.....	336
Hoth v. Peters, 55 Wis. 405.....	886
Houck v. Ritter, 76 Penn. St. 280.....	736
Hounsell v. Smyth, 29 L. J. 208.....	68
House v. Alexander, 105 Ind. 109; 55 Am. Rep. 189.....	55
Houston v. Gaswell, 7 Jones, 161.....	754
Houston v. Houston, 67 Ind. 276.....	416
Houston, etc., Ry. Co. v. Randolph, 24 Tex. 317.....	390
Hoverson v. Noker, 60 Wis. 513.....	877
Hovey v. Hobson, 53 Me. 451.....	410
Hovey v. Mayo, 45 Me. 323.....	508
Howard v. Daly, 61 N. Y. 362; 19 Am. Rep. 283.....	329
Howard v. Ingersoll, 13 How. 381, 427.....	26
Howard v. Woodward, 10 Jur. (N. S.) 1123.....	368
Howe v. Walker, 4 Gray, 318.....	137
Howell v. K. L. Ins. Co., 44 N. Y. 276; 4 Am. Rep. 675.....	873
Howell v. McCoy, 3 Rawle, 256.....	733
Howlett v. Haswell, 4 Camp. 118.....	56
Hoyt v. City of Hudson, 27 Wis. 656; 9 Am. Rep. 473.....	26
Hoyt v. Jeffers, 20 Mich. 181.....	795
Hoyt v. N. Y. Life Ins. Co., 3 Bow. 440.....	852
Hoyt v. Wilkinson, 57 Vt. 404.....	55
Hubbard v. Curtis, 8 Iowa, 1.....	539
Hubbard v. W. U. Tel. Co., 33 Wis. 553; 14 Am. Rep. 775.....	610

	PAGE.
Huckshold v. St. Louis, I. M. & S. Ry. Co., Miss Supt. Ct. Jan. 31, 1887.....	648
Huey v. Huey, 65 Mo. 689.....	250
Hughes v. Graves, 1 Llt. (Ky.) 317.....	231
Hughes v. Hood, 50 Mo. 350.....	613
Hughes v. Macfie, 2 H. & Colt. 744.....	399
Hughes v. W. & St. P. R. Co., 27 Minn. 141.....	833
Hulseman v. Bema, 41 Penn. St. 306.....	377
Hume v. Barton, 1 Ridg. Pl. 77.....	410
Humphrey v. Douglass, 33 Am. Dec. 177.....	57
Humphreys v. Armstrong Co., 56 Penn. St. 394.....	116
Hungerford v. Redford, 39 Wis. 345.....	362
Hunoom v. Hunoom, 15 Mass. 194.....	245
Hunter v. Fitzmaurice, 102 Ind. 54.....	424
Mussey v. Ryan, 64 Md. 435; 64 Am. Rep. 772.....	571
Hutchins v. Hutchins, 1 Hogan, 315.....	551
Hutchinson v. Concord, 41 Vt. 271.....	867
Huxley v. Hartzell, 44 Mo. 370.....	113
Hyde v. Noble, 38 Am. Dec. 508.....	562
Ihl v. Forty-second St. R. Co., 47 N. Y. 317; 7 Am. Rep. 450.....	396
Indianapolis, etc., R. Co. v. Means, 14 Ind. 30.....	704
Indianapolis, etc., Co. v. Wilcox, 59 Ind. 429.....	55
Ingersoll's Appeal, 36 Penn. St. 240, 245.....	431
Ingerson v. Berry, 14 Ohio St. 315.....	377
Institute v. Norwood, Busb. Eq. 65.....	76
Ins. Co. v. Hogan, 80 Ill. 89.....	853
Ins. Co. v. Mosley, 8 Wall. 397, 412, 185, 196.....	189
Ins. Co. v. Mosley, 8 Wall. 397, 412, 194.....	544
Ins. Co. v. Murphy, 111 U. S. 744.....	240
Ins. Co. v. Sefton, 53 Ind. 380.....	857
Ins. Co. v. Surges.....	854, 857
Ins. Co. v. Terry, 15 Wall. 580.....	642
Ins. Co. v. Williams, 39 Ohio St. 584, 781.....	784
International, etc., R. Co. v. Cocke, 64 Tex. 151.....	704
Ireland v. Geraghty, 15 Fed. Rep. 39.....	289
Irving v. Ford, Sup. Ct. Mich. April 14, 1887.....	147
Isaac v. Davies, 68 Ga. 169.....	338
Isabel v. Hannibal, etc., R. Co., 60 Mo. 475.....	394
Isabel v. New York, etc., R. Co., 27 Conn. 362.....	394
Isham v. Greenham, 1 Handy, 361.....	813
Jackson v. Bank, etc., 10 Penn. St. 61.....	64
Jackson v. Hathaway, 15 Johns. 447, 452.....	499
Jackson v. Lamphire, 3 Peters, 280.....	278
Jackson v. Leek, 12 Wend. 107.....	391
Jackson v. Phillips, 14 Allen, 539.....	568
Jackson v. Phipps, 13 Johns. 421.....	283, 291
Jackson v. Van Vechten, 11 Johns. 201.....	81
Jacksonville Street R. Co. v. Campbell, 21 Fla. 175.....	697
Jaffray v. McGeehee, 107 U. S. 361.....	762
Jamison v. Collins, 63 Penn. St. 359.....	113
Jeffersonville, etc., R. Co. v. Bowen, 40 Ind. 545.....	396
Jeffries v. Life Ins. Co., 22 Wall. 47.....	783
Jenkins v. North Carolina Ore Dressing Co., 65 N. C. 563.....	653, 654
Jenkins v. Walter, 8 Gill & J. 218; 39 Am. Dec. 539.....	64
Jessen v. Sweigert, 66 Cal. 163.....	571, 573
Jessen v. Wright, 2 Bligh (H. L. Cas.) 1, 56.....	428
Jeter v. Penn, 23 La. Ann. 230; 26 Am. Rep. 98.....	101
John and Cherry Streets, In the matter of, 19 Wend. 659.....	417

	PAGE.		PAGE.
Johns v. Fenton, 86 Mo. 64.....	87,	Kettlewell v. Stewart, 8 Gill. 502.....	761
Johnson v. Chic., etc., Ry. Co., 31 Minn. 57.....	795	Key v. Davis, 1 Md. 32.....	410
Johnson v. Cummins, 16 N. J. Eq. 97.....	755	Kidd v. Johnson, 400 U. S. 616.....	151
Johnson v. Farley, 45 N. H. 405.....	258	Kidder v. (bellis), 59 N. H. 473.....	34
Johnson v. Harrelson, 18 S. C. 304.....	257	Kidder v. Parkhurst, 3 Allen. 293.....	576
Johnson v. Hoffman, 53 Mo. 504.....	108	Kilbourn v. Thompson, 103 U. S. 168.....	280
Johnson v. Marriott.....	530 801, 802, 804	
Johnson v. Smith, 1 Ves. 214.....	245	Kiley v. City of Kansas, 87 Mo. 103.....	111
Jones v. Boston, 104 Mass. 75; 6 Am. Rep. 194.....	867	Killips v. P. F. Ins. Co., 28 Wis. 473, 483; 9 Am. Rep. 506.....	872
Jones v. C. & G. R. Co., 30 S. C.; 19 A. & E. R. Cases, 459.....	705	Kilpatrick v. Smith, 77 Va. 347.....	377
Jones v. Commissioners, etc., 77 N. C. 290.....	377	Kluard v. Young, 2 Rich. Eq. 247.....	274, 277
Jones v. George, 66 Tex. 149; 42 Am. Rep. 689.....	730	King v. Anderson, 20 Ind. 386.....	37
Jones v. Harris, 1 Strob. 180.....	245	King v. Leake, 5 B. & Ad. 469.....	145
Jones v. Jones, 6 Conn. 111.....	285	King v. Pease, 1 Barn. & Ald. 30.....	808
Jones v. Lovelace, 99 Ind. 317.....	280	King v. State, 9 Tex. Co. App. 515.....	641
Jones v. N. O. & S. E. Co., 70 Ala. 232.....	335, 336	King v. Watson, 3 Exch. 6.....	674
Jones v. Rains.....	198	Kingsbury v. Burnside, 58 Ill. 810.....	295
Jones v. Robinson, 78 N. C. 306.....	76	Kingsbury v. Milner, 69 Ala. 504.....	602
Johnson v. Pie, 1 Lev. 180.....	53	Kinsler v. Clark, 1 Rich. 170.....	251
Johnson v. State, 65 Ga. 94.....	193	Kilgore v. Jordan, 17 Tex. 341.....	59
Johnson v. State, 19 Tex. Ct. App. 453; 51 Am. Rep. 285.....	630, 637	Kittewell v. Stewart, 8 Gill. 472.....	674
Joliet v. Harwood, 86 Ill. 110-116.....	567	Kiluck v. Colby, 40 N. Y. 427; 7 Am. Rep. 380.....	686
Jones v. State, Tex. Ct. App., Nov. 17, 1893.....	567	Kline v. Cent. Pac. R. Co., 37 Cal. 400.....	393
Jones v. State, 18 Tex. App. 482.....	442	Knight v. Abert, 6 Penn. St. 472; 48 Am. Dec. 478.....	68
Joseph v. Cawthorn, 74 Ala. 411.....	442, 443	Knight v. Pontchartrain R. Co., 23 Ann. 472.....	166
Judy v. Gilbert, 77 Ind. 96; 40 Am. Rep. 249.....	72, 73, 415	Koeer, Ex parte, 60 Cal. 177.....	770
Julian v. Western Union Tel. Co., 98 Ind. 327.....	25	Krauer v. State, 61 Miss. 158.....	185
Justice v. N. V. R. Co., 87 Penn. St. 28.....	226, 229	Kyser v. Kansas, etc., R. Co., 56 Iowa, 207.....	704
Kanaga v. Railroad, 76 Mo. 214.....	92, 93, 95	Ky. R. v. Thomas, 50 Mo. 139; 36 N. Y. 135.....	168
Kansas, etc., Ry. Co. v. Fitzsimmons, 22 Kans. 686; 31 Am. Rep. 208.....	389	L. R. & F. S. Ry. v. Dean, 43 Ark. 529.....	771
Kansas Pac. R. Co. v. Peavey, 29 Kans. 169; 44 Am. Rep. 620; 11 Am. & Eng. R. Cas. 260.....	637	L. R. & F. S. Tel. Co. v. Davis, 41 Ark. 79.....	767
Kauffelt v. Bower, 7 S. & R. 64-76.....	317	Lackland v. R. Co., 81 Mo. 180.....	303
Keefhaver v. Commonwealth, 2 Pen. & W. 240.....	134	Lafayette, etc., R. Co. v. Huffman, 28 Ind. 287.....	895
Keffe v. Milwaukee, etc., Ry. Co., 21 Minn. 307; 18 Am. Rep. 393.....	389	Lake Shore & M. S. R. Co. v. Spangle, 44 Ohio St. 471.....	837
Kelley v. City of Columbus, 41 Ohio St. 263.....	524	Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274.....	394, 398
Kelley v. C. M. & St. P. R. Co., 53 Wis. 74.....	886	Lakeview v. Rose Hill Cemetery Co., 70 Ill. 191; 23 Am. Rep. 71.....	400
Kelley v. Few, 18 Ohio, 441.....	841	Lambe v. Eames, L. R., 10 Eq. Cas. 267.....	427
Kellogg v. Chicago & N. W. Ry. Co., 26 Wis. 223; 7 Am. Rep. 69.....	783	Lander v. People, 104 Ill. 248.....	189
Kellogg v. Lovely, 46 Mich. 131; 41 Am. Rep. 151.....	231	Landis v. Hamilton, 77 Mo. 554.....	147
Kelly v. Dawson, 2 Mol. 57.....	228	Lane v. Bryant, 9 Gray. 245.....	566
Kelly v. Dill, 23 Minn. 435.....	584	Lane v. Stewart, 20 Mo. 93.....	793
Kelly v. Dutch Church, 2 Hill, 106.....	603	Langston v. Ginther, 3 Md. 40.....	761
Kelly v. Rubie, 11 Oreg. 75.....	317	Langdon v. Union Mut. L. Ins. Co., 98 Mass. 381; 14 Fed. Rep. 273.....	849, 853
Kelly v. Scotts, 49 L. J. Ch. (N. S.) 383.....	99	Langford v. Oswale, 2 Bibb. 215.....	339
Kelly's Case, 19 Ga. 425, 426.....	406	Langham v. Wood, 15 Wend. 546.....	295
Kendrick v. State, 55 Miss. 436.....	185	Lansing v. Railroad, 49 N. Y. 541; 10 Am. Rep. 417.....	122
Kennedy v. Mayor, etc., 73 N. Y. 365; 29 Am. Rep. 169.....	525	Lauman v. McGregor, 94 Ind. 301.....	385
Kennedy v. Milwaukee, etc., Ry. Co., 22 Wis. 581.....	417	Lapointe v. Middlesex R. Co., Mass. Sup. Ct., Feb. 24, 1887.....	115
Kennedy v. State, 19 Tex. Ct. App. 620.....	630	Larnore v. Crown Point Iron Co., 101 N. Y. 391; 54 Am. Rep. 718.....	513
Kenney v. Williams, 14 Barb. 623.....	499	Larne v. Russell, 26 Ind. 386.....	528
Keon v. Nesbitt, 1 Sause & Scully, 365.....	551	Larned v. Larned, 11 Met. 431.....	146
Kerr's Case.....	791	Lary v. Cleveland, etc., R. Co., 78 Ind. 323; 41 Am. Rep. 572.....	67, 389
Kerman v. Howard, 23 Wis. 108.....	549	Law v. London Policy Co., 1 Kay & J. 223.....	856
Kerwacker v. R. Co., 3 Ohio St. 173.....	697	Law v. Long, 41 Ind. 586.....	413
		Lawrence v. Barker, 5 Wend. 301-305.....	519
		Lawson v. State, 20 Ala. 65; 55 Am. Dec. 182.....	532
		Leah v. Roth, 39 Ark. 66.....	763
		Lease v. Owen Lodge, etc., 83 Ind. 498.....	416
		Leasne v. Bray, 3 East, 593.....	417, 698, 706

TABLE OF CASES CITED.

XXVII

PAGE.	PAGE.
Leary v. B. & A. R. Co., 139 Mass. 584. 588	Lord v. Proctor, 7 Phila. 639. 308
Leather Cloth Co. v. American Leather Co., 11 H. L. Cas. 523. 151	Lorillard v. Monroe, 11 N. Y. 306; 69 Am. Dec. 120. 307
Lee County v. Rogers, 7 Wall. 181. 276	Loomis v. Eagle H. & L. Ins. Co., 6 Gray, 309. 563
Lee v. Haley, L. R., 5 Ch. App. 155. 4	Loomis v. Marshall, 12 Conn. 60; 30 Am. Dec. 398. 304
Lee v. Keys, 88 Penn. St. 175. 713	Losce v. Buchanan, 51 N. Y. 479; 10 Am. Rep. 623. 557
Lee v. Lee, 67 Ala. 408. 591	Louisville, etc., Ry. Co. v. Falvey, 104 Ind. 409. 304
Lee v. Wyse, 35 Conn. 384. 751	Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624; 50 Am. Rep. 186. 301
Lees v. Moaly, 1 Y. & Coll. Exch. Cases, 589. 428	Lovett v. Salem, etc., R. Co., 9 Allen, 557. 303
Le Fevre v. Casaque, 5 Colo. 584. 101	Low v. Towns, 8 Ga. 360. 360
Lefevre v. Lefevre, 50 N. Y. 424; 46 Am. Rep. 77. 74	Lower Macungie Township v. Merkhoffer, 71 Penn. St. 276. 527
Le Forest v. Tolman, 117 Mass. 109; 19 Am. Rep. 400. 140	Loweth v. Smith, 12 M. & W. 508. 356
Leggett v. Hyde, 58 N. Y. 272; 17 Am. Rep. 244. 103	Luby v. H. R. R. Co., 17 N. Y. 131. 564
Leggett v. McClelland, 39 Ohio St. 624. 758	Lucas v. Milwaukee Railroad, 38 Wis. 41; 14 Am. Rep. 735. 165
Leigh v. Mobile & Ohio R. Co., 58 Ala. 165. 387	Ludden v. Hazen, 31 Barb. 650. 385
Leonard v. Storer, 115 Mass. 86; 15 Am. Rep. 76. 574	Lund v. Tyngsborough, 9 Cush. 36. 185
Lemon v. Phoenix Mut. L. Ins. Co., 38 Conn. 294. 302. 849, 853	Lyon v. Cambridge, 136 Mass. 419. 367
Le Neve v. Le Neve, 3 Atk. 646. 52	Lyon v. Green Bay & Minnesota Ry. Co., 42 Wis. 548. 261
Lessee of Flynn v. Marshall, 1 Ir. L. R. (O. S.) 59. 551	Lyon v. Mells, 5 East, 428. 775
Levy v. New York, 1 Sandf. 465. 808	Lyon v. Ry. Co., 42 Wis. 538. 326
Lewis v. Few, 5 Johns. 85. 679, 687, 692	Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631. 865
Lewis v. Greicher, 51 N. Y. 231. 101	Lyon v. State, 22 Ga. 399. 236
Lewis v. Lee, 15 Ind. 499. 604	Lyon v. Williams, 5 Gray, 457. 199
Lewis v. Smith, 9 N. Y. 502. 406	Lynch v. Nurdin, 1 Ad. & El. (N. S.) 29. 511
Lewis v. McCabe, 49 Conn. 140; 44 Conn. 217. 898	Lynch v. Nurdin, 1 Q. B. 29. 399
Lewis v. Price, 3 Rich. Eq. 198. 256	Lyne v. Wann, 72 Ala. 45. 582
Lenox v. United Ins. Co., 3 Johns. Cas. 178. 737	Lypick v. B. & O. R. Co., 17 W. Va. 427. 688
Lexington & Or. Co. v. Applegate, 8 Dana, 239. 303	Lynch v. Mayor, 76 N. Y. 60; 32 Am. Rep. 271. 222
Lickbarrow v. Mason, 2 T. R. 70. 424	McAllister v. Butterfield, 31 Ind. 25. 72
Lindsay v. Conn. R. Co., 27 Vt. 543. 704	McAllister v. Commonwealth, 30 Penn. St. 536. 64
Lindsay v. People, 63 N. Y. 143. 544	McAlpin v. Powell, 70 N. Y. 126; 26 Am. Rep. 554. 386, 389
Linter v. Milkin, 47 Ill. 197. 105	McBride v. Republic Ins. Co., 30 Wis. 582. 872
Linzee v. Mixer, 101 Mass. 512. 368	McCahill v. Mehrbach, 37 Hun, 504. 751
Lipes v. Hand, 104 Ind. 508. 28	McCall v. Hinckley & Woodward, 4 Gill, 128. 674, 761
Lisbey v. Lisbey, 2 Tenn. Ch. R. 5. 262	McCarty v. Roots, 21 How. 432. 39
Little v. Hackett, 116 U. S. 306. 179	McClain v. Davis, 77 Ind. 419. 400
Little v. Madison, 42 Wis. 643; 49 Wis. 606; 24 Am. Rep. 435. 857	McClelland v. Louisville, etc., Ry. Co., 94 Ind. 276. 391
Little v. State, 90 Ind. 336; 46 Am. Rep. 224. 381	McComas v. Long, 85 Ind. 549. 64
Little Miami Railroad Co. v. Stevens, 30 Ohio. 415. 594, 636	McCormick v. Ray City, 23 Mich. 457. 226
Little Rock & Ft. S. R. Co. v. Eubanks, Ark. Sup. Ct., Mar. 13, 1887. 857	McCormick v. Cheevers, 124 Mass. 262. 137
Little Rock, etc., Ry. Co. v. Jones, 41 Ark. 157. 704	McCormick v. Kansas City, St. J. & C. B. R. Co., 70 Mo. 359; 35 Am. Rep. 431. 321
Little Rock, etc., Ry. Co. v. Leverett, Ark. Sup. Ct., Feb. 5, 1887. 566	McCourt v. Eckstein, 22 Wis. 153. 447
Liverpool, etc., Ass'n v. Fairhurst, 9 Exch. 422. 56	McCoy v. California, etc., R. Co., 40 Cal. 532. 704
Live Stock Ass'n v. Crescent City, 1 Abb. (N. S.) 298. 401	McCray v. Lipp, 35 Ind. 116. 427, 431
Livingston v. McDonald, 21 Iowa, 180. 223	McCrary v. Ruddick, 33 Iowa, 521. 880
Livingston v. Tompkins, 4 Johns. Ch. 415. 366	McCullock v. Eagle Ins. Co., 1 Pick. 288. 780
Lloyd v. Lloyd, 10 Eng. L. & Eq. 139. 567	McDaniel v. King, 90 N. C. 597. 74
Lock v. Furze, L. R., 1 C P 441. 607	McDermott v. Hannibal & St. J. R. Co., Mo. Sup. Ct., June, 1886. 568
Locke v. First Division St. Paul, etc., R. Co., 15 Minn. 259. 396	McDonald v. Hazeltine, 53 Cal. 85. 10
Locke v. Furze, 19 C. B. (N. S.) 96. 604	McDonald v. Keeler, 39 Hun, 563; 52 Am. Rep. 49; 99 N. Y. 463. 803, 804
Locke v. St. Paul, etc., R. Co., 15 Minn. 259. 704	McDonnell v. Battle House Co., 67 Ala. 40; 42 Am. Rep. 69. 101
Loder v. Kerkule, 3 C. B. (N. S.) 128. 457	McDowell v. Hendrix, 67 Ind. 513. 27
Loftus v. Union Ferry Co., 84 N. Y. 456; 38 Am. Rep. 528. 525	McFarland v. Newman, 9 Watts, 55; 34 Am. Dec. 497. 739
Logan v. State, 5 Tex. App. 306. 403	McFarland's Case, 8 Abb. Pr. (N. S.) 57. 642
Lord v. Graw, 48 Penn. St. 86. 739	McGary v. Loomis, 63 N. Y. 104; 20 Am. Rep. 510. 511

	PAGE.		PAGE.
McGinnies' Case, 31 Ga. 261, 262	466	Mayhew v. Burns, 108 Ind. 393	69
McGirr v. Sell, 60 Ind. 249	385	Mayor, etc., of Macon v. Hays, 25 Ga. 590	313
McGovern v. N. Y. C. & H. R. R. Co., 67 N. Y. 418	511	Mayor, etc., of Memphis v. Woodward, 12 Helsk. 499	313
McGuire v. Grant, 25 N. J. L. 356	338	Mayrant v. Richardson, 1 Nott & Mc-Cord, 347	697
McGuire v. Spence, 91 N. Y. 303	511	Meagher v. County of Storey, 5 Nev. 24, 313	313
McKiaslok v. Railroad Co., 73 Mo. 590	703	Mechanics' Bank v. Earp, 4 Hawle, 336	731
McLain v. Wallace, 103 Ind. 562	64	Mechanics' Bank v. Gorman, 8 Watts & Serg. 304	674
McLean v. Fleming, 96 U. S. 251	4	Meeks v. Southern Pacific R. Co., 56 Cal. 513; 38 Am. Rep. 67	398
McLean v. Blue Pt. M. Co., 5 Cal. 257	10	Messel v. L. & B. R. R. Co., 8 Allen, 234	115
McLean v. Button, 19 Barb. 450	288	Meilen v. Morrill, 127 Mass. 545	574
McLeod v. Guither's Admr., 80 Ky. 399	567	Melton v. Gibson, 97 Ind. 158	46
McMahon v. Third Ave. R. Co., 47 N. Y. Super. Ct. 232	363	Memphis & C. R. Co. v. Jones, 2 Head. 517	837
McNamara v. Clintonville, 64 Wis. 207	610	Menagh v. Whitwell, 52 N. Y. 146; 11 Am. Rep. 683	569
McNaughten Case, 10 Cl. & Fin. 200	642	Mercer v. Ry. Co., 36 Penn. St. 99	308
McNell v. Tenth Nat. Bk., 46 N. Y. 325; 7 Am. Rep. 241	493	Merchants' Bank v. Comstock, 55 N. Y. 24; 14 Am. Rep. 169	632
McQueney v. Heister, 38 Penn. St. 444	552	Merienthal v. Shafer, 6 Iowa, 236	765
McWilliams v. Nisley, 2 S. & R. 562; 7 Am. Dec. 664	430	Merket v. Smith, 33 Kans. 66	63
Macaulay v. Mayor, etc., 67 N. Y. 602	525	Merritt v. Robinson, 35 Ark. 493	770
Macdonnell v. Harding, 7 Sim. 178	64	Mersereau v. Pearsall, 19 N. Y. 108	339
Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506	606	Messer v. Oestreich, 52 Wis. 634	609
Maclay v. Harvey, 90 Ill. 525; 32 Am. Rep. 35	779	Methodist E. Church v. Jaques, 3 Johns. Ch. 79	261, 262
Macomber v. Taunton, 100 Mass. 255	867	Methodist Episcopal Church v. Hoboken, 4 Vroom, 13	114, 146
Mactier v. Frith, 6 Wend. 103; 21 Am. Dec. 262	778, 779	Michoud v. Girod, 4 How. 554, 555	554
Mary v. City of Indianapolis, 17 Ind. 267	24	Miles v. King, 5 S. C. 146	278
Maddox v. Brown, 71 Me. 432; 36 Am. Rep. 336	877	Miles v. Lingerian, 24 Ind. 385	413
Maddox v. Graham, 2 Metc. (Ky.) 56	161	Milhau v. Sharp, 15 Barb. 210	503
Malcolm v. Hodges, 8 Md. 418	760, 761	Milhaus v. Dunham, 78 Ala. 48	591
Mandlebaum v. McDonell, 29 Mich. 78	430	Miller v. Baschore, 83 Penn. St. 356	748
Mangam v. Brooklyn R. Co., 38 N. Y. 455	397, 511	Miller v. Comm., 27 Gratt. 110	504
Manhattan Medicine Co. v. Wood, 108 U. S. 213	150	Miller v. Conklin, 17 Ga. 430	675
Mann v. Stephens, 15 Sim. 377	368	Miller v. Goddard, 34 Me. 102	837, 839
Mansfield v. Trigg, 113 Mass. 350	127	Miller v. Sherry, 2 Wall. 237	584
Marrott v. Marquette, etc., R. Co. 49 Mich. 99; 47 Mich. 1	397, 398	Miller v. Traverse, 8 Bing.	79, 80, 81
Marcus v. Insurance Co., 68 N. Y. 635	857	Millett v. Ford, 109 Ind. 159	434
Marcus v. St. L. Mut. L. Ins. Co., 68 N. Y. 635	873	Millett v. Parker, 2 Metc. (Ky.) 608	226
Mariner v. Dyer, 2 Greenl. 165	380	Milnes v. Busk, 2 Ves. Jr. 496	262
Mariner v. Smith, 5 Helsk. 203	119	Milwaukee and St. P. Ry. Co. v. Kellogg, 24 U. S. 469	794
Markle v. Wright, 13 Ind. 548	377	Milwee v. Milwee, 44 Ark. 112	755
Marks v. Baker, 28 Minn. 162	681	Miner's Bank v. Hellner, 47 Penn. St. 452, 745	745
Marquette, etc., R. Co. v. Taft, 28 Mich. 289	392	Missouri Valley Ins. Co. v. McCrumb, Sup. Ct. Kans. Jan. 7, 1887	655
Marshall v. Moseley, 21 N. Y. 280	27	Mitchell v. State, 71 Ga. 128; 42 Ga. 211	187
Martin v. Cole, 104 U. S. 80	799	Mitchell v. Bryan, 3 Ohio St. 377	295
Martin v. New York, etc., R. Co., 103 N. Y. 626	568	Mitchell v. Tomlinson, 91 Ind. 167	46
Martin v. Robson, 65 Ill. 129; 16 Am. Rep. 578	766	Mitchell v. Union L. Ins. Co., 45 Me. 104	852
Mauran v. Smith, 8 E. I. 182; 5 Am. Rep. 564	340	Mitchum v. State, 11 Ga. 616	185
Masals' Case, 1 Keen. 74	535	Mixon v. Roe, 12 Gratt. 425	665
Mason v. Partridge, 65 N. Y. 633	102	Mo. Valley Ins. Co. v. Sturges, 18 Kans. 93; 28 Am. Rep. 761	849
Mason v. Sarzent, 104 U. S. 699	504	Mobile R. Co. v. Ashcraft, 48 Ala. 15	189
Mason v. Wittborne, 2 Cold. 242	64	Mobile, etc., R. Co. v. Hudson, 50 Miss. 572	704
Massey v. Parker, 2 M. & K. 174	693	Mobile R. Co. v. Kennedy, 74 Ala. 566	613
Masterton v. Cheek, 23 Ill. 76	205	Molwoo v. Court of Wards, L. R. 4 P. C. 419	99, 100
Masterton v. Mayor, etc., of Brooklyn, 7 Hill, 60, 67, 68; 42 Am. Dec. 38	436	Monopolies, Case of, 11 Rep. 84	619
Mateer v. Brown, 1 Cal. 221; 52 Am. Dec. 303	788	Moody v. Leverick, 4 Daly, 401	827
Matthews v. Supervisors of Copiah Co., 53 Miss. 713; 24 Am. Rep. 715	313	Moore v. Hershey, 90 Penn. St. 196	411
Mattle A. Hand	737	Moore v. Houston, 3 S. & R. 175	738
Mayer v. Clark, 40 Ala. 259	587	Moore v. Met. Bank, 55 N. Y. 41; 14 Am. Rep. 173	492, 493, 494
Mayer v. Shields, 59 Miss. 107	762	Moore v. Shultz, 13 Penn. St. 68; 53 Am. Dec. 446	430
Mayes v. State, Sup. Ct. Miss. Feb. 7, 1887	184	Moore v. Valentine, 77 N. C. 188	324
		Morgan v. Morgan, 5 Madd. 410	754
		Morgan's Appeal, 39 Mich. 675	326

TABLE OF CASES CITED.

xxix

PAGE.	PAGE.
Morrissey v. Eastern R. Co., 126 Mass. 377; 31 Am. Rep. 636..... 389, 398	New Castle v. Red River R. Co., 1 R. 147. 190
Morrill v. Ferrier, 7 Colo. 21..... 750	Newcome v. Dunham, 27 Ind. 285..... 46
N. Am. Ins. Co. v. Jones, 2 Binney, 547.	Noyes v. Anderson, 1 Duer, 342..... 603
N. Y. Cent. Ins. Co. v. Watson, 23 Mich. 496..... 347, 351	Nulrod v. Gilham, 1 P. Wms. 577..... 295
Nagle v. Missouri, etc., Ry. Co., 75 Mo. 653; 42 Am. Rep. 418..... 399	Oakham v. Holbrook, 11 Cush. 303..... 571
Nashville & Chat. R. Co. v. Erwin (Tenn.) 3 Am. & Eng. R. Cas. 465..... 168	Oates v. Nat. Bank, 100 U. S. 239..... 39
National Bank v. Ins. Co., 104 U. S. 54..... 590	O'Donnell v. R. Co., 59 Penn. St. 241..... 725
National, etc., Society In re., L. R. 5 Ch. App. 309..... 356	Oebrechts v. Ford, 33 How. 49..... 199
Nave v. Flack, 90 Ind. 205; 46 Am. Rep. 205..... 389	Oeuer v. Phoenix Ins. Co., 27 Wis. 693; 9 Am. Rep. 479..... 872
Naylor v. C. & N. W. R. Co., 53 Wis. 664..... 883	Offerman v. Starr, 2 Penn. St. 394; 44 Am. Dec. 211..... 745
Needham v. Grand Trunk Ry., 38 Vt. 194..... 142	Orden v. Orden, 4 Ohio St. 182..... 50
Neff v. Landis, 1 Atlantic R. 177..... 57	Ohio, etc., R. Co. v. Miles, 76 Va. 773..... 704
Neil v. Trustees, etc., 31 Ohio, 15..... 842	Ohio Life and Trust Co. v. Deboit, 16 How. 432..... 276
Nellis v. Clark, 4 Hill, 424..... 765	Oleott v. Supervisors, 16 Wall. 678..... 276
Neilson v. Board, etc., 105 Ind. 287..... 29	Oldham v. Brown, 28 Ohio St. 52..... 841
New v. Walker, 108 Ind. 365..... 52	Oliver v. Worcester, 102 Mass. 498, 499; 3 Am. Rep. 485..... 145
Newbough v. Walker, 8 Gratt. 16..... 607	Olmstead v. Keyes, 85 N. Y. 593..... 849, 855
Newbury Turnpike Corp. v. East R. Co., 33 Pick. 328..... 302	Omlchund v. Barker, 1 Willcs, 531; 1 Atk. 21..... 246
Newborough v. Walker, 8 Gratt. 16..... 604	Oneal v. State, 47 Ga. 220, 248..... 474
	Otis v. Beckwith, 49 Ill. 121..... 293, 295
	Ourlings v. Jones, 9 Ind. 108..... 571
	Owens v. R. Co., 58 Mo. 388, 390..... 709

	PAGE.		PAGE.
P. & C. R. Co. v. Sentmeyer, 92 Penn. St. 230; 37 Am. Rep. 624.	868	People v. Forquer, Breese (Ill.), 104	377
Penn. & Ohio Canal Co. v. Graham, 63 Penn. St. 290; 3 Am. Rep. 549.	712	People v. Home Ins. Co., 92 N. Y. 335.	506
Penn., etc., Nav. Co. v. Dandridge, 8 Gill & J. 248, 319.	355	People v. Horn, 62 Cal. 130.	644
Packet Co. v. Clough, 20 Wall. 546.	556	People v. Horinson, 8 Barb. 560.	681
Padmore v. Lawrence, 11 A. & E. 330.	683	People v. Hurley, 8 Cal. 390.	226
Page v. Fowler, 39 Cal. 413.	362	People v. Jackson, etc., Co., 9 Mich. 285.	774
Pannell v. Hurley, 2 Coll. 241.	591	People v. Kerr, 27 N. Y. 138.	302, 303
Palmer v. City of Concord, 48 N. H. 211.	681	People v. Lohfelem, 103 N. Y. 1.	147
Palmer v. Gillespie, 95 Penn. St. 340; 40 Am. Rep. 667.	748	People v. Mayor of Brooklyn, 4 N. Y. 419; 55 Am. Dec. 236.	504
Palmer v. Merrill, 6 Cush. 232; 52 Am. Dec. 782.	849	People v. Messersmith, 61 Cal. 246.	482
Palmer v. Miner, 8 Hun. 342.	47	People v. Moring, 3 Abb. Dec. 539.	507
Palmer v. Waddell, 23 Kans. 352.	25	People v. Potter, 63 Cal. 127.	812
Parish v. Wheeler, 22 N. Y. 494, 506.	355	People v. R. & S. L. R. Co., 76 N. Y. 294.	489
Parks v. City of Boston, 15 Pick. 196, 203; 19 Am. Dec. 322.	416	People v. Safford, 5 Den. 112.	519
Park Bank v. Watson, 42 N. Y. 470; 1 Am. Rep. 573.	630	People v. Spencer, 61 Cal. 123.	555
Parker v. Amazon Ins. Co. 34 Wis. 363.	672	People v. Stager, 10 Wend. 431.	134
Parker v. Canfield, 37 Conn. 350; 9 Am. Rep. 317.	102, 104	People v. Staton, 73 N. C. 546; 21 Am. Rep. 479.	442
Parker v. Keit, 12 Mod. 467.	442	People v. Sullivan, 7 N. Y. 326.	226
Parker v. State, 1 S. W. Rep. 202.	771	People v. Supervisors of Orange Co., 17 N. Y. 239.	505
Parker v. Steamboat, 109 Mass. 449.	189	People v. Vernon, 25 Cal. 49.	185
Parlange v. Faures, 14 Ann. 199.	199	People v. Walter, 68 N. Y. 403, 411.	382
Parsons v. Johnson, 68 N. Y. 62; 23 Am. Rep. 149.	627	People v. Welsh, 63 Cal. 167.	668
Patch v. White, 1 Mack. 468.	77	People v. Yates, 40 Ill. 128.	380
Patterson v. Hulbs, 65 N. C. 119.	377	Perkins v. Hays, 3 Gray, 405.	604
Patterson v. Kentucky, 97 U. S. 501.	41	Perley v. County of Muskegon, 32 Mich. 132; 20 Am. Rep. 637.	562
Patterson v. Patterson, 59 N. Y. 574; 17 Am. Rep. 384.	817	Perley v. Eastern R. Co., 96 Mass. 414.	792
Patterson v. Railroad, 76 Penn. St. 399; 18 Am. Rep. 412.	122, 124	Perry v. Aldrich, 13 N. H. 343; 38 Am. Dec. 493.	27
Pawling v. United States, 4 Cranch. 219.	225, 226	Perry v. City of Worcester, 6 Gray, 554; 66 Am. Dec. 431.	25
Payne v. Little, 26 Beav. 1.	262	Peters v. Bowman, 98 U. S. 56.	316
Payne v. June, 92 Cal. 252.	385	Peters v. Porter, 60 How. Pr. 422.	74
Payne v. Powell, 5 Bush. 248.	286	Peverly v. City of Boston, 136 Mass. 396; 49 Am. Rep. 366.	116
Pearpoint v. Graham, 4 Wash. 232.	763	Pfeifle v. Sec. Ave. R. Co., 19 Week. Dig. 44.	566
Pearson v. Keedy, 6 B. Monr. 128; 48 Am. Dec. 160.	587, 589	Phalen v. Clark, 19 Conn. 421; 50 Am. Dec. 253.	765
Pearson v. Pearson, 27 Ch. D. 145.	154	Philadelphia & Reading R. Co. v. Irwin, 89 Penn. St. 70.	738
Pearson v. Post, 20 Wend. 111; 22 Wend. 425.	144	Philadelphia v. T. R. Co., 6 Whart. 42.	302
Pence v. Kelly, 3 Or. 418.	317, 318	Philadelphia, etc., R. Co. v. Williams, 54 Penn. St. 103.	417
Peck v. Weddell, 17 Ohio St. 271.	377	Phillip v. Phillip, 4 De G., F. & J. 208.	452
Pegram v. Commissioners, 65 N. C. 114.	161	Phoenix Ins. Co. v. Doater, 106 U. S. 30.	810
Peillon v. Brookling, 25 Beav. 218.	663	Pierce v. New Bedford, 129 Mass. 534.	861
Peizer v. Campbell & Co., 15 S. C. 597.	290	Pierson v. State, 18 Tex. Ct. App. 534.	648
Pemberton v. King, 2 Dev. 376.	324	Piester v. Piester, 22 S. C. 139.	274, 275, 276
Pence v. State, Ind. Sup. Ct., Feb. 1887.	651	Piggott v. E. C. R. Co., 54 Eng. C. L. 228.	666, 669, 706
Pennell v. Deffell, 4 De G., M. & G. 372.	64	Pinkney v. Keyler, 4 E. D. Smith. 469.	105
Pennsylvania R. Co. v. Hope, 80 Penn. St. 373; 21 Am. Rep. 100.	791	Pinkston v. Hine, 9 Ala. 252.	604
Pennsylvania Co. v. Kelly, 31 Penn. St. 372.	393	Piper v. Moulton, 72 Me. 155.	596
Pennsylvania R. Co. v. Kerr, 62 Penn. St. 353; 1 Am. Rep. 431.	791, 793, 794	Pitcher v. Dove, 99 Ind. 175.	51
People v. Ab Lee, 60 Cal. 95.	185	Pittsburgh, etc., Ry. Co. v. Adams, 106 Ind. 151.	57
People v. B. & A. R. Co., 70 N. Y. 569.	489	Pittsburgh, etc., Ry. Co. v. Bingham, 29 Ohio St. 364; 23 Am. Rep. 751.	66
People v. Blake, 60 Cal. 497.	147	Pittsburgh, etc., Ry. Co. v. Vining, 27 Ind. 613.	395
People v. Bissell, 19 Ill. 229; 68 Am. Dec. 591.	380	Pixley v. Clark, 35 N. Y. 520, 532.	557
People v. Bostwick, 32 N. Y. 445.	50	Planters' Con. Ass'n v. Hance, 52 Miss. 469.	377
People v. Clary, 17 Wend. 374.	131	Plate v. Railroad Co., 37 N. Y. 472.	339
People v. D. & C. R. Co., 58 N. Y. 182.	489	Plummer v. Wildman, 3 M. & S. 482.	735
People v. Davis, 56 N. Y. 95, 102, 186, 187.	544	Poeppers v. M., K. & P. Ry. Co., 67 Mo. 75; 29 Am. Rep. 518.	793
People v. Draper, 24 Barb. 265.	377	Poland v. Miller, 95 Ind. 387; 48 Am. Rep. 730.	739
People v. Equitable Trust Co., 96 N. Y. 387.	504	Polk v. Buchanan, 5 Sneed, 721.	102
People v. Fire Association of Philadelphia, 92 N. Y. 311; 44 Am. Rep. 300.	507	Pomeroy v. Chicago & N. W. R. Co., 16 Wis. 640.	302
		Pomeroy v. Partington, 3 T. R. 665.	608
		Pomfroy v. Village of Saratoga Springs, 34 Hun. 607.	146

TABLE OF CASES CITED.

xxxi

	PAGE.		PAGE.
Pond v. Cummins, 50 Com. 373.	101	Rawlins v. Danvers, 5 Esp. 38.	738
Pooley v. Dwyer, 5 Ch. D. 453.	104	Rawls v. Life Ins. Co., 27 N. Y. 333; 84	868
Popokey v. Munkwitz, Sup. Ct. Wis.,		Am. Dec. 233.	868
Mar. 1, 1887.	606	Rawson v. Haight, 2 Bing. 103.	198
Porch v. Frise, 18 N. J. Eq. 304.	755	Ray v. Manchester, 45 N. H. 59.	867
Porter v. Sweeney, 81 Tex. 213.	27	Reading Iron Works v. Devine, 109	725
Porter v. Village of Attica, 33 Hun. 606.	144	Penn. St. 244.	725
Portland Bk. v. Apthorp, 12 Mass. 332.	504	Rearick v. Wilcox, 81 Ill. 71.	681
Powell v. Biddle, 2 Dall. 70.	76	Reavis v. Garner, 12 Ala. 564.	761
Powell v. Board, etc., 49 Penn. St. 46.	58.	Rector v. Buckhart, 3 Hill. 131.	571
	428, 429	Reesiver D. and S. Mfg. Co., Matter of	
Powell v. Hankey, 2 P. Wms. 33.	261, 282	App. of, 77 N. Y. 101.	475
Power v. Whitmore, 4 M. & S. 141.	737	Red v. City Council of Augusta, 25 Ga.	
Powers v. Council Bluffs, 45 Iowa. 652;		386, 390.	436
23 Am. Rep. 175.	837	Reed v. Doubt, 62 Ill. 948.	293
Prall v. Smith, 81 N. J. L. 244.	755	Reed v. Perkins, 14 Ala. 231.	564
Prathers v. Lexington, 13 B. Monr. 154.	868	Redington's Case, 14 Cox Crim. Cas.	
Pratt v. Short, 79 N. Y. 437; 35 Am.		341.	185
Rep. 531.	256	Redder v. Flinn, 6 S. C. 240.	261
Pray v. Garcelon, 17 Me. 145.	750	Reeves v. State, 20 Ala. 33.	244
Proble v. Baldwin, 6 Cush. 549, 558.	137	Rogina v. Jones, 4 L. E. 154.	582
Prudogast v. N. Y., etc., R. Co., 58		Rogina v. Petrie, 4 El. & Bl. 737, 743.	146
N. Y. 652.	386	Rogina v. Beardon, 4 F. & F. 70.	532
Price v. Furman, 97 Vt. 238; 65 Am.		Rols v. Lawrence, 43 Cal. 129; 49 Am.	
Dec. 194.	55	Rep. 87.	8
Price v. Grand Rapids, etc., R. Co.,		Reserve Mut. Ins. Co. v. Kane, 81 Penn.	
18 Ind. 137.	550	St. 154.	862
Price v. Hewett, 5 Exch. 146.	56	Rex v. Bedford Level, 3 East. 356.	442
Price v. Jennings, 62 Ind. 111.	54	Rex v. Chambers, 3 Cox Cr. C. 92.	532
Price v. Supreme Lodge Knights of		Rex v. Foster, 6 C. & P. 325.	183
Honor. Tex. Sup. Ct.	857	Rex v. Mead, 2 Barn. & Ad. 605.	544
Princeville v. Auten, 77 Ill. 325.	144	Rex v. Stewart, 12 Ad. & Ell. 773.	817
Proctor v. DeCamp, 83 Ind. 539.	655	Rex v. White, J. Leach, 430.	657
Protzman v. I. & C. R. Co., 6 Ind. 467.	808	Reynolds v. Pool, 84 N. C. 37; 97 Am.	
Providence v. Clapp, 17 How. 161.	360	Rep. 607.	101
Provident Ins. Co. v. Baum, 29 Ind.		Reynolds v. U. S. 98 U. S. 145.	712
236.	856	Rhodes v. Railway Pass. Ins. Co., 5	
Prudential Assur. Co. v. Knott, L. R.,		Lans. 77.	865
10 Ch. 143.	138	Rice v. Austin, 19 Minn. 103; 18 Am.	
Prutaman v. Baker, 30 Wis. 644; 11 Am.		Rep. 330.	390
Rep. 562.	284	Rice v. King Phillip Mills, 144 Mass. 229.	725
Puffer v. Orange, 122 Mass. 369.	530	Rice v. Nixon, 97 Ind. 97; 49 Am. Rep.	
Pumpelly v. Green Bay Company, 13		430.	430
Wall. 189, 191.	499	Rieh v. Johnson, 2 Pin. 86.	609
Pumpelly v. Phelps, 40 N. J. Eq. 60.	603	Richard v. Robson, 81 Beav. 244.	600
Purcell v. Fowler, 2 C. P. Div. 216.	691	Richardson v. Chynoweth, 26 Wis. 656.	610
Purnam v. Wise, 1 Hill. 234.	101, 107	Richardson v. Hughtill, 76 N. Y. 55; 32	
Petnam v. Wood, 3 Mass. 481.	736	Am. Rep. 267.	101, 102, 103
		Richardson v. N. Y. C. R., 98 Mass. 85.	143
Quackenbos v. Kingsland, 102 N. Y.		Richardson v. Pate, 86 Ind. 423; 47 Am.	
123; 55 Am. Rep. 771.	429	Rep. 374.	413
Queen v. Cox, 14 Q. B. Div. 153.	663, 664	Ricketts v. Sostetter, 19 Ind. 125.	614
Queen v. Ridpath, 10 Mod. 152.	134	Riddle's Case.	813
Quick v. Milligan, 108 Ind. 419.	423, 424	Riddlehoover v. Kinard, 1 Hill Ch. 381.	256
Quinn v. Hard, 43 Vt. 575; 5 Am. Rep.		Ridgeway v. Lamphear, 99 Ind. 251.	427
224.	632		428, 434
R. C. v. Rooraem, 25 N. J. Eq. 450.	826	Ridout v. Lewis, 1 Atk. 269.	262
R. Co. v. Canton Co., 30 Md. 352.	323	Riggs v. American Tract Society, 84 N.	
R. Co. v. Stout, 17 Wall. 657.	511	Y. 830.	407
Reg v. Lung, 6 Cox C. C. 477.	184	Riley v. Railroad Co., 125 Mass. 292.	228
Reg v. Nicholas, 3 C. & K. 246.	659	Riley v. Schawacker, 50 Ind. 592.	46
Racine Co. Bank v. Lathrop, 12 Wis.		Ring v. Wheeler, 7 Cow. 725.	578
456.	51	Ripley v. Davis, 15 Mich. 80.	363
Railroad Co. v. Deal, 90 N. C. 110.	323	Roath v. Driscoll, 30 Conn. 540; 52 Am.	
Railroad Co. v. Kerr.	791	Dec. 352.	562
Railroad Co. v. McMillan, 7 (Ohio) Am.		Robert v. West, 15 Ga. 122.	604
& Eng. R. Cases, 588.	708	Roberts v. Boston, 5 Cush. 198.	34
Railroad Co. v. Means, 14 Ind. 30.	708	Roberts v. Continental Ins. Co., 41 Wis.	
Railroad Co. v. Nat. Bank, 102 U. S. 14.	39	321.	872
Railroad v. Patton.	697	Roberts v. Wilcoxson, 36 Ark. 355.	755
Railroad Co. v. Railroad Co., 72 Mo. 67.	84	Robbins v. Embry, 1 Sm. & March. 208.	675
Railroad Co. v. Stout, 17 Wall. 657.	369	Robbins v. Farley, 2 Strob. 348.	750
Railroad Co. v. Valleley, 38 Ohio St. 345.	362	Robbins v. Magee, 76 Ind. 381.	50
Raleigh v. Griffith, 37 Ark. 150.	763	Robbins v. Webb, 77 Ala. 176; 68 Ala.	
Ranch v. Lloyd, 31 Penn. St. 358.	393	293.	627
Randall v. Rich, 11 Mass. 494.	24	Robins v. Quinliven, 79 Penn. St. 333.	423
Rankin v. Lodor, 21 Ala. 360.	674		429
Rapp v. Vogel, 45 Mo. 624.	98	Robinson v. Abell, 17 Ohio, 36.	841

PAGE.		PAGE.	
Robinson v. Cone, 23 Vt. 213	397	Scott v. Shepherd, 2 W. Bl. 802	304
Robinson v. Eagle, 29 Ark. 202	755	Scott v. Wilmington, etc., R. Co., 4	704
Robinson v. Mullett, 4 Price, 353	550	Jones L. 432	704
Robinson v. St. Louis, etc., R. Co., 21		Scranton v. Phillips	746
Mo. App. 141	704	Scrugham v. Wood, 15 Wend. 544	286, 293
Robinson v. Ward, 2 C. & P. 60	84		294
Robinson, Ex parte, 2 Blas. 409	41	Sears v. Giddey, 41 Mich. 590; 32 Am.	
Robson's Case, Russ. & R. 413	874	Rep. 163	817
Rockwell v. Browne, 36 N. Y. 207	067	Secomb v. R. Co., 23 Wall. 108	325
Roesner v. Hermann, 10 Blas. 486; 8 Fed.		Security Ins. Co. v. Fay, 22 Mich. 467	347
Rep. 732	837		351
Rogers v. Blackwell, 49 Mich. 192	410	See'- v. Blair, Wright (Ohio), 338	683, 687
Rogers v. Ludlow Manuf'g Co., 144			692
Mass. 144	725	Selden v. Canal Co., 21 Barb. 363-364	557
Rogers v. Whitehouse, 71 Me. 222	380	Seiser v. Brooke, 3 Ohio St. 302	623
Root v. King, 7 Cow. 623	678, 679, 687, 692	Seiser v. Roberts, 105 Penn. St. 242	739
Root v. Lowndy, 6 Hill, 518; 41 Am. Dec.		Sessions v. Johnson, 95 U. S. 347	592
702	686	Seymour v. Cole, 38 Iowa, 463	416, 417
Rose v. Wynn, 42 Ark. 257	607	Sewell v. Broad, etc., 20 Ohio St. 89	34
Roseboom v. Roseboom, 81 N. Y. 356	427	Seybert v. Bean, 33 Penn. St. 450	614
Rosenfeld v. Haight, 53 Wis. 280; 40		Seymour v. Hubert, 32 Penn. St. 499	738
Am. Rep. 770	102	Sharp v. State, 15 Tex. App. 171	582
Rosenthal v. Mayhugh, 33 Ohio St. 155;		Shaw v. Hoffman, 26 Mich. 163	607
49 Am. Rep. 87	7	Shaw v. Newell, 1 R. I. 488	751
Rowan v. Portland, 8 B. Monr. 232, 248	144	Shaw v. Spencer, 100 Mass. 382; 1 Am.	
Rowland v. Bass, 2 McCord Ch. 817	256	Rep. 115	591
Rozell v. Andrews, N. Y. Ct. App.,		Sheckell v. Johnson, 10 Cush. 25	678
Oct. 5, 1886	147	Sheff v. City of Huntingdon, 16 W. Va.	
Ruckman v. Ruckman, 32 N. J. Eq. 259	288	307	168
Rudd v. Matthews, 79 Ky. 479; 42 Am.		Sheldon v. A. F. & M. Ins. Co., 26 N. Y.	
Rep. 231	51	460	873
Rudick v. Otis, 33 Iowa, 402	103	Sheldon v. Clark, 1 Johns. 512	403
Ruillon v. Post, 79 Ill. 567	84	Shelly's Case	427, 431, 433, 434
Russell v. Brown, 63 Me. 203	337	Shelton v. Johnson, 40 Iowa, 84	879
Russell v. Columbia, 74 Mo. 490	109	Shepard v. Milwaukee Gaslight Co., 15	
Ryan v. Kennedy, 62 Iowa, 37	147	Wis. 318	610, 612
Ryan v. New York Cent. R. Co., 35 N.		Sheppard v. Brown, 4 Giff. 208	105
Y. 210	731, 793, 794, 795	Sheridan v. Colvin, 78 Ill. 237	577
Ryan v. Ulmer, 104 Penn. St. 322	739	Sheridan v. Medina, 10 N. J. L. 409	108
		Sherman v. Madison Mut. Ins. Co., 39	
Salter v. Ham, 81 N. Y. 321	106	Wis. 104	872
Saltonstall v. Baker, 8 Gray, 195	574	Sherry v. Brown, 66 Ala. 51	581
Sanderson v. City of Scranton	743, 746	Sherry v. Frecking, 4 Duer, 457	446, 447
Sands, Sir Edwin's Case	737	Shiner v. Mann, 99 Ind. 190; 50 Am.	
Sanford v. Jackson, 10 Paige, 266	495	Rep. 82	427, 428, 433, 434
Sanford v. Remington, 2 Ves. Jr. 189	530	Shipley v. Fifty Associates, 106 Mass.	
Sargent v. Metcalf, 5 Gray, 306	337	194-200	557
Sasse v. State, Sup. Ct. Wis., Mar. 22,		Shipwright v. Clements, 19 W. R. 599	151
1887	649	Shorts' Estate, In re, 16 Penn. St. 63	504
Satterlee v. Mathewson, 2 Peters, 380	278	Shover v. State, 10 Ark. 259	770
Saunders v. State, 94 Cr. L. Mag. 147	042	Shrock v. Crowl, 83 Ind. 243	54
Savage v. Burnham, 17 N. Y. 561	496	Shurtleff v. Francis, 118 Mass. 154	288
Sawyer v. U. S. Casualty Co., 8 Am.		Sibley v. Perry, 7 Vesey, 532	423
Law Reg. (U. S.) 233	864	Siceloff v. Redman, 26 Ind. 251, p. 259	427
Saxonia M. & R. Co. v. Cooke, 7 Col.			431
559	828	Sifred v. Commonwealth, 104 Penn. St.	
Seaffe v. Argall, 74 Ala. 473	582	179	742
Seaffe v. Thompson, 15 S. C. 308	257	Sims v. Everhardt, 102 U. S. 300	56
Scarborough v. Boardman, 1 Beav. 34;		Simpson v. Simpson, 30 Ala. 225	581
4 M. & C. 377	093	Simpson v. State, 81 Ind. 90	638
Scheffler v. Minneapolis, etc., Ry. Co.,		Single v. Schneider, 30 Wis. 570	393
32 Minn. 518	396	Skidmore v. Collier, 15 N. Y. 50	589
Schlner v. Railroad Co., 40 Iowa, 337	703	Skinner v. Merchants' Bank, 4 Allen, 290	591
	704	Slade v. Paschal, 67 Ga. 541	612
Schliapp v. Currie, 55 Miss. 597; 30 Am.		Slaughter House Cases, 16 Wall. 36	401, 618
Rep. 530	588		772, 773
Schindler v. Westover, 99 Ind. 395	421	Smart v. Blanchard, 42 N. H. 137	678
Schloss v. Heriot, 14 C. B. (N. S.) 59	735	Smith v. Barrie, 56 Mich. 514; 56 Am.	
Scholey v. Raw, 23 Wall. 331	504	Rep. 391	308
Schomer v. Hekla Ins. Co., 50 Wis. 576	872	Smith v. Bean, 15 N. H. 577	765
School District, etc., v. First Nat'l		Smith v. Bodine, 74 N. Y. 30	101
Bank, 102 Mass. 174	64	Smith v. Columbus State Bank, 9 Neb.	
Schoolfield v. Johnson, 11 Fed. Rep.		31	707
297	762	Smith v. Eastern R. Co., 35 N. H. 356	47
Schultz v. Milwaukee, 49 Wis. 254	807	Smith v. Hayward, 7 Ad. & Ell. 544	528
Schuneman v. Paradise, 46 How. Pr.		Smith v. Higgins, 16 Gray, 251	634
426	58	Smith v. Jewett, 40 N. H. 530	306
Schuykill Navigation Co. v. Moore, 2		Smith v. Knight, 71 Ill. 148; 22 Am.	
Whart. 477	721	Rep. 94	101, 105

TABLE OF CASES CITED.

xxiii

PAGE.	PAGE.		
Smith v. Lord Camelford, 2 Ves. Jr. 716.....	262	State v. Dent, 25 W. Va. 1.....	402
Smith v. Mallory, 24 Ala. 628.....	588	State v. DeWolf, 8 Conn. 98; 20 Am. Dec. 90.....	536
Smith v. McCarthy, 56 Penn. St. 359.....	380	State v. Dorsey, 6 Gill 388.....	504
Smith v. Myers, 109 Ind. 1.....	403	State, ex rel., v. Doyle, 40 Wis. 175.....	404
Smith v. Pelch, 2 Strange, 1237.....	700	State v. Drew, 17 Fla. 67.....	300
Smith v. Rome, 19 Ga. 89.....	502	State v. Estoup, La. Sup. Ct., Feb. 1887.....	599
Smith v. South Royalton Bank, 32 Vt. 341; 76 Am. Dec. 179.....	50	State v. Governor, 1 Dutch (N. J.) 331.....	377
Smith v. St. Louis, etc., Ry. Co., Mo. Sup. Ct., Feb. 1887.....	568	State v. Governor, 39 Mo. 388.....	300
Smith v. Union Bank of Georgetown, 5 Pet. 518.....	277	State v. Graham, 15—.....	305
Smith v. Winderlich, 70 Ill. 496.....	607, 612	State ex rel., v. Greensdale, 106 Ind. 364; 55 Am. Rep. 753.....	63, 64
Smyley v. Reese, 53 Ala. 89; 25 Am. Rep. 598.....	818	State v. Gregory, 83 Mo. 123; 63 Am. Rep. 565.....	401
Smythe v. Scott, 106 Ind. 245.....	38	State v. Gut, 13 Minn. 341.....	642
Snow v. Railroad, 8 Allen, 450.....	122	State v. Guy, 69 Mo. 430.....	654
Snyder v. Hannibal, etc., R. Co., 60 Mo. 413.....	389	State v. Harris, 89 Ind. 363; 46 Am. Rep. 189.....	309
Sohire v. Johnson, 111 Mass. 242, 243.....	151	State v. Jones, 64 Iowa, 349.....	190
Somers v. Pumphrey, 24 Ind. 231 (238).....	408	State v. Johnson, 10 Tex. App. 571.....	482
Somes v. Brewer, 2 Pick. 184; 13 Am. Dec. 406.....	52	State v. Johnston.....	243
Soon Hing v. Crowley, 113 U. S. 703.....	16	State v. Judge, etc., Louisiana Supreme Ct., Feb. 7, 1887.....	772
Sorenson v. Mendsha, P. & P. Co. 56 Wis. 338.....	885	State v. Kelm, 8 Neb. 63.....	562, 563
Soulard v. United States, 4 Pet. 511.....	417	State v. Knapp, 45 N. H. 143, 156.....	532
Southern R. Co. v. Reeves, 64 Ga. 492.....	628	State v. Kopp, 15 N. H. 212.....	801
Southwestern R. Co. v. Rowan, 43 Ga. 411, 414.....	436	State v. Lamson, 8 Hawk. 178.....	244
Soutter v. City of Madison, 15 Wis. 30.....	161	State v. Lowry.....	206
Souverbye v. Arden, 1 Johns. Ch. 240, 256.....	235, 293, 295	State v. McCants, 1 Speer, 393.....	286
Sparks v. Hess, 15 Cal. 186.....	561	State v. Martin, 31 Ann. 849; 3 Crim. Law Mag. 44.....	206, 644
Spaulding v. Inhabitants of Winslow, 74 Me. 523.....	529	State v. Marvin, 35 N. H. 22.....	532
Specht v. Commonwealth, 8 Penn. St. 312; 49 Am. Dec. 512; 45 Am. Dec. 518.....	771	State v. Middleham, 62 Iowa, 150, 189, 235.....	235
Specht v. Howard, 16 Wall. 564.....	774	State v. Miller, 98 Ind. 70.....	404
Spencer's Case, Smith Lead. Cas. 27.....	624	State v. Morea, 2 Ala. (N. S.) 275.....	658
Spillman v. Roanoke Nav. Co., 74 N. C. 675.....	389	State v. Murray, 11 Oreg. 413.....	642
Spinney, Ex parte, 10 Nev. 323.....	402	State v. N. H. & N. R. Co., 37 Conn. 153, 488.....	381
Spivey v. Morris, 18 Ala. 251.....	592	State v. Nichols, 29 Ark. 74; 7 Am. Rep. 600.....	400
Spotts v. Cowan, 9 Ann. 620.....	199	State v. Noyes, 47 Me. 189.....	296
Springfield v. R. Co., 4 Cush. 63.....	302	State v. Paulk, 18 S. C. 515.....	482
Spurr v. Andrew, 6 Allen, 420.....	127	State v. Payne, 86 N. C. 600.....	226
Squire v. Dean, 4 Bro. C. C. 398.....	262	State v. Peck, 63 Me. 284.....	226
St. John v. Am. Mut. L. Ins. Co., 13 N. Y. 31.....	849	State v. Pepper, 31 Ind. 76; 22 Ind. 399.....	226
St. John v. Ins. Co. 13 N. Y. 31.....	844, 855	State v. Pittsburgh & Connellsville R., 45 Md. 41.....	142
St. John v. Mayor, 13 How. Pr. 537.....	614	State v. Pomeroy, 25 Kans. 349.....	193
St. Louis, etc., Ry. Co. v. Freeman, 36 Ark. 41.....	396	State v. Railroad Co., 15 W. Va. 362; 36 Am. Rep. 803.....	775
Stack v. Beach, 74 Ind. 571; 39 Am. Rep. 113.....	799	State v. Rand, 51 N. H. 361.....	219
Stafford v. Elliott, 69 Ga. 837.....	479, 480	State v. Randall, 1 Strobl. 111.....	306
Stafford v. Roof, 9 Cow. 628.....	55	State v. Redemier, 71 Mo. 173; 36 Am. Rep. 482.....	482
Stallings v. Harrold, 60 Ga. 478.....	468	State v. Scanlan, 58 Mo. 206.....	657
Stanley v. Valentine, 79 Ill. 544.....	50	State v. Sloss, 25 Mo. 291; 69 Am. Dec. 407.....	381
Starr v. Commonwealth, 7 Dana, 243.....	124	State v. Smith, 19 Iowa, 334.....	161
State v. Anderson, 30 Ark. 131.....	770	State v. Smith, 75 N. C. 306.....	651
State v. Atherton, 16 N. H. 203, 210.....	146	State v. Stark, 1 Strobl. 506.....	265, 267
State v. Bonner, 2 Head, 135.....	220	State v. State Med. Ex. Board, 32 Minn. 324; 50 Am. Rep. 675.....	402
State v. Byrne, 47 Conn. 465.....	536	State v. Stout, 6 Halst. 124, 133.....	133, 134
State v. Carroll, 38 Conn. 449; 9 Am. Rep. 409.....	425, 442	State v. Sullivan, 70 Ala. 589.....	147
State v. Clark, 69 Iowa, 294.....	186	State v. Thompson, 9 Iowa, 188.....	236
State v. Coleman, 8 S. C. 243.....	244	State v. Underwood, 77 N. C. 502.....	664
State v. Coleman, 20 S. C. 454.....	265	State v. Walker, 73 Mo. 380.....	198
State v. Copp, 15 N. H. 212.....	380	State v. Wallace, 9 N. H. 515.....	532
State v. Creight, 1 Brev. 169; 2 Am. Dec. 656.....	243	State v. Walters, 45 Iowa, 389.....	532
State v. Daugherty, 17 Nev. 376.....	193	State v. Warmouth, 22 La. Ann. 1.....	390
		State v. Way, 5 Neb. 287.....	532
		State v. West, 1 Houst. Cr. Cas. (Del.) C. 505.....	482
		State v. Williams, 2 McCord, 301; 66 N. C. 505.....	242, 243, 244, 653, 654
		Stearnes v. State, 21 Tex. 692.....	633, 634
		Stedman v. Smith, 8 El. & B. 1.....	447
		Steele v. Sullivan, 70 Ala. 589.....	147
		Steffen v. C. & N. W. S. Co., 46 Wis. 259.....	865
		Sterling v. Drake, 29 Ohio St. 457; 23 Am. Rep. 732.....	381

	PAGE.		PAGE.
Stevens v. Dennett, 51 N. H. 324.....	82	Thayer v. Brooks, 17 Ohio, 499.....	339
Stevens v. Warren, 101 Mass. 584.....	857	The Bond Debt Cases, 12 S. C. 232.....	276
Stevenson v. Hancock, 72 Mo. 612.....	23	The King v. Foster, 4 Car. & P. 325.....	105
Stevenson v. Harrison, 3 Litt. 170.....	608	The Manhamet, U. S. Dis. Ct., East. Dist. Virginia, Feb. 1884.....	115
Stevenson v. McLean, 5 Q. B. Div. 346; 20 Moak's Eng. 341; 30 Am. Law Reg. 16.....	779	The Queen v. Bradfield, L. R., 9 Q. B. 552.....	146
Stevenson v. O'Neill, 71 Ill. 814.....	45	Thomas v. Bishop, 2 Strange, 655.....	831
Steward v. Reditt, 3 Md. 79.....	283	Thomas v. Hillhouse, 17 Iowa, 67.....	231
Stewart v. Ross, 50 Miss. 776.....	758	Thomas v. Railroad Co., 101 U. S. 71.....	356
Stewart's Case, 5 Irvine, 310.....	636	Thomas v. State, 67 Ga. 460.....	167
Stinger v. Comm., 26 Penn. St. 422.....	504	Thomas v. Winters, 12 Ind. 322.....	325
Strang v. People, 24 Mich. 16.....	532	Thomas & W. Manuf'g Co. v. Wabash, St. L. & P. R. Co., 62 Wis. 642; 51 Am. Rep. 752.....	610
Strong v. New York Firemen's Ins. Co., 11 Johns. 323.....	737	Thompson v. Barclay, 27 Penn. St. 263.....	738
Stokes v. McKibben, 13 Penn. St. 267.....	784	Thompson v. Blanchard, 4 N. Y. 308, 311.....	519
Stockham v. Stockham, 33 Md. 196.....	778	Thompson v. Bostwick, McNall, Bq. 79.....	257
Stone v. Wetmore, 43 Ga. 601.....	877	Thompson v. Gibson, 7 M. & W. 456; 337, 342.....	403
Stoughton's Appeal, 38 Penn. St. 193.....	746	Thompson v. Hazen, 25 Me. 104.....	613
Stowe v. Davis, 10 Ired. 431.....	76	Thompson v. Ins. Co., 104 U. S. 252; 612, 613.....	410
Stuart v. Palmer, 74 N. Y. 133; 30 Am. Rep. 239.....	504	Thompson v. Leach, 3 Mod. 310.....	363
Stubbins v. Goodal, 4 Ga. 106.....	799	Thompson v. Molles, 46 Mich. 42.....	509
Studwell v. Shapter, 54 N. Y. 249.....	56	Thompson v. Pitcher, 2 Marsh. 61.....	600
Straughan v. Fairchild, 30 Ind. 596.....	39	Thompson v. Shakespeare, 1 L. T. Rep. (N. S.) 398.....	402
Stringer v. Adams, 98 Ind. 539.....	50	Thompson v. Staats, 15 Wend. 395.....	184
Strode v. Comm., 52 Penn. St. 181.....	504	Thompson v. Trevelyan, Skin. 402; 183, 184.....	527
Strong v. City of Stevens Point, 62 Wis. 255.....	229	Thorn v. Blanchard, 6 Johns. 508.....	189
Sunderlin v. Bradstreet, 46 N. Y. 191; 7 Am. Rep. 322.....	686	Thorne v. Tait, 8 Ann. 8.....	427
Sun Mutual Insurance Company v. City of New York, 2 Sandf. 40.....	506	Thornhill v. Hall, 2 Cl. & F. 22.....	179
Sutton v. Clarke, 6 Taunt. 11.....	557	Thoroughgood v. Bryan, 6 C. B. 115.....	140
Sutton v. N. Y. Cent. & H. R. R. Co., 66 N. Y. 213.....	513	Thorpe v. Rutland, etc., R. Co., 27 Vt. 140; 62 Am. Dec. 625.....	400
Suydam v. Moffatt, 1 Sand. 463.....	579	Tredgill v. Pintard, 12 How. 24.....	316
Swann v. Swann, 21 Fed. Rep. 299.....	771	Thrupp v. Harman, 3 M. J. & K. 513.....	261
Swartout v. Mich. Air-line R. Co., 24 Mich. 389.....	354	Thurston v. Dickinson, 2 Rich. Eq. 317; 46 Am. Dec. 56.....	257
Swasey v. American Bible Society, 57 Me. 523.....	596	Tide Water Canal Co. v. Archer, 9 Gill. & John. 479.....	417
Swasey v. Union Manufg. Co., 43 Conn. 558.....	362	Tiffin v. McCormack, 34 Ohio St. 644.....	557
Sweeney v. Baker, 13 W. Va. 132; 31 Am. Rep. 757.....	678, 680	Tift v. Jones, 52 Ga. 533.....	297
Sweeney v. Old Colony & Newport Rail- road Co., 10 Allen, 383, 377.....	68	Tilden v. Johnson, 52 Vt. 628; 36 Am. Rep. 769.....	363
Sweetland v. Ill. & Miss. Tel. Co., 27 Iowa, 433; 1 Am. Rep. 235.....	212	Tillinghast v. Champlain, 4 R. I. 173.....	589
Swick v. Ins. Co., 2 Dill, 130.....	857	Tilson v. Robbins, 68 Me. 296; 28 Am. Rep. 50.....	678
Swift v. Tyson, 16 Peters, 1.....	39	Timmerman v. Morrison, 14 Johns. 369.....	402
Swords v. Edgar, 59 N. Y. 26; 17 Am. Rep. 295.....	572	Tipton v. LaRose, 27 Ind. 484.....	420
Tallmadge v. East River Bank, 2 Duer, 614.....	368	Titus v. Kyle, 10 Ohio St. 444.....	531
Tankersley v. Graham, 8 Ala. 247.....	799	Tobias v. Ketchum, 32 N. Y. 319.....	496
Taylor v. Bush, 75 Ala. 439.....	101	Tod v. Wick, 26 Ohio St. 370.....	41
Taylor v. Barnes, 69 N. Y. 490.....	603	Toledo Agr'l Works v. Work, 70 Ind. 253.....	41
Taylor v. Beck, 3 Rand. (Va.) 316.....	47	Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456.....	326
Taylor v. Merchants' Fire Ins. Co., 9 How. 380.....	779	Toogood v. Spyrg, 1 C. M. & R. 193.....	682
Taylor v. Owens, 2 Blackf. 301; 20 Am. Dec. 115.....	625	Town of Old Town v. Dooley, 81 Ill. 255.....	501
Taylor v. Tolen, 38 N. J. Eq. 91.....	76	Town of Palatine v. Kruger, 8ap Ct. Ill., May 12, 1887.....	500
Templeton v. Voehlor, 73 Ind. 134; 37 Am. Rep. 150.....	25	Town of Winchester v. Hinedale, 12 Conn. 87.....	475
Tenant, Ex parte, L. R., 6 Ch. Div. 303.....	99	Townley v. Chicago, etc., Ry. Co., 53 Wis. 626.....	369
Tenny v. Johnson, 43 N. H. 144.....	589	Townsend v. Weld, 8 Mass. 146.....	131
Tenny's Case, 23 N. H. 162.....	380	Train v. Kendall, 137 Mass. 386.....	332
Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168.....	304	Transportation Co. v. Chicago, 99 U. S. 635-644.....	557
Terre Haute, etc., R. Co. v. McMurray, 98 Ind. 359; 49 Am. Rep. 752.....	302	Trask v. Cal. S. R., 63 Cal. 96.....	12
Terry v. N. Y., etc., R. Co., 22 Barb. 575.....	704	Tremmel v. Kiehlolt, 75 Mo. 255.....	754
Thatcher v. St. Andrews's Church, 37 Mich. 264.....	268	Trout v. McDonald, 83 Penn. St. 144.....	745
		Trull v. Granger, 8 N. Y. 115; 4 Seld. 116 607, 614.....	605
		Truman v. Fenton.....	456
		Troy v. Railroad Co., 23 N. H. 88.....	337

TABLE OF CASES CITED.

XXXV

	PAGE.		PAGE.
Trustees v. Gilman, 55 Miss. 148.	750	Waldron v. Portland, etc., R. Co., 35 Me. 422.	704
Trustees, etc., v. People, 87 Ill. 308; 29 Am. Rep. 55.	34	Walker v. Great Western Ry. Co., L. R. 2 Exch. 228.	362
Trustees of Watertown v. Cowen, 4 Paige, 510.	628	Walker v. Hirsch, 51 L. T. Rep. (N. S.) 481.	101
Tucker v. Henniker, 41 N. H. 317.	651	Walker v. Moore, 10 B. & C. 416.	405
Tucker v. Seamen's Aid Society, 7 Metc. 188.	78	Walker v. Vincent, 19 Penn. St. 369.	431
Tucker v. West, 29 Ark. 386.	705	Walker v. Walker, 42 Ill. 311.	293
Tulk v. Moxhay, 3 Phill. 774.	368	Wall v. Wall, 30 Miss. 91.	295
Tullet v. Armstrong, 1 Bev. 1; 4 Myl. & Cr. 377.	668	Wallace v. People.	644
Tanuo v. Hoppoldt, 2 McCord. 189. 274.	277	Waller v. Fowler, 3 Sause & Scully, 389.	551
Turnpike Co. v. Brown, 8 Bart. 490; 35 Am. Rep. 713.	380	Walsh v. Chicago, M. & St. P. R. Co., 42 Wis. 30; 24 Am. Rep. 378.	610
Tyler v. Sturdy, 106 Mass. 196.	144	Walsh v. Railroad Co., 8 Nev. 110.	703
Tyrie v. Fletcher, Cowp. 665, 666.	784	Walsh v. Virginia, etc., R. Co., 8 Nev. 111.	704
Tyson v. State, 8 Md. 578.	504	Walters v. Whitlock, 9 Fla. 87.	674
Union Bank v. Union Ins. Co., Dudley, L. & E. 171.	735	Walton v. White, 5 Md. 296.	78
Union Central Life Ins. Co. v. Bernard, 33 Ohio St. 459.	753	Ward v. Berkshire Life Ins. Co., 108 Ind. 301.	56
Union Mutual Life Ins. Co. v. McMillen, 788 Union Pac. Ry. Co. v. High, 14 Neb. 14.	704	Ward v. Smith, 11 Price, 19.	613
Union School Tp. v. First Nat'l Bank, 102 Ind. 494.	25	Ward v. Ward, 2 Hayw. (N. C.) 226.	286
Union Trust Co. v. Cuppy, 26 Kan. 754.	339	Warner v. Payne, 2 Sand. 210.	579
Unity, etc., Banking Ass'n, Ex parte, 3 DeG. & J. 63.	57	Warnock v. Davis, 104 U. S. 775. 850, 852, 857.	857
Utica Ins. Co. v. Lynch, 11 Paige, 530.	64	Warner v. Bennett, 31 Conn. 468.	366
U. S. v. Mingo, 2 Curt. 1.	236	Warren v. Cole, 15 Mich. 265.	363
U. S. v. Dewitt, 9 Wall. 41.	42	Warren v. Taylor, 60 Ala. 218.	586
U. S. v. Hudson, 7 Cranch, 32.	801	Warren v. Warren Thread Co., 134 Mass. 247.	151
U. S. v. New Bedford Bridge, 1 W. & M. 401.	601	Washburn v. Bank, 19 Vt. 278.	589
U. S. v. Kennedy, 3 McLean, 175.	245	Watertown v. Cowen, 4 Paige, 510.	144
U. S. v. Reese, 92 U. S. 214.	42	Watson v. Mercer, 8 Peters, 88.	278
Vallant v. Dodermead, 2 Ark. 524.	550	Watts v. Holland, 56 Tex. 54.	299
Valentine v. Stewart, 15 Cal. 387-401.	540	Waugh v. Horner, 2 H. Bl. 247.	99
Valle v. Obenhouse, 62 Mo. 81, 83, 89, 90, 93, 94.	82	Waugh v. Montgomery, 67 Ala. 578.	102
Vallett v. Parker, 6 Wend. 515.	47	Way v. Powers, 57 Vt. 135.	877
Valton v. Nat. F. L. Ass. Co., 20 N. Y. 849, 854.	855	Weaver v. Barden, 49 N. Y. 286.	494
Vanderwiele v. Taylor, 65 N. Y. 341.	222	Weaver v. Ward, Hopk. 134.	698
Vandryke v. Dare, 1 Bail. 65.	242	Webb v. Robbins, 68 Ala. 293; 77 Ala. 178.	628
Van Dyke v. State, 24 Ala. 81.	602	Webb v. Rome, W. & O. R. Co., 49 N. Y. 430; 10 Am. Rep. 839.	791
Van Ness v. Packard, 3 Pet. 137.	323	Webb's Case, 9 Tex. Ct. App. 490.	640
Van Rensselaer v. Read, 26 N. Y. 558, 574.	623	Webster v. Phoenix Ins. Co., 36 Wis. 672.	872
Van Wyck v. Aspinwall, 17 N. Y. 190.	689	Weed v. Burr, 78 N. Y. 192.	329
Vase v. Smith, 6 Cranch, 225.	56	Weed v. Village of Ballston Spa, 76 N. Y. 329.	509
Vaughan v. Godman, 94 Ind. 191; 103 Ind. 499.	50	Weeden v. Town Council, 9 R. I. 128.	382
Vaughan v. Thomas, Ch. Div., June 11, 1896.	600	Weeks v. Lego, 9 Ga. 199.	694
Veale v. Boston, 135 Mass. 187, 189.	145	Winer v. Sterling, 61 Ala. 98.	581
Vernon v. Vernon, 53 N. Y. 351.	496	Wels v. City of Madison, 75 Ind. 241; 39 Am. Rep. 185.	23
Vernon v. Vestry of St. James, 16 Ch. D. 449.	146	Wells v. McCall, 64 Penn. St. 207.	694
Verplank v. Sterry, 12 Johns. 596; 7 Am. Dec. 348.	460	West v. Bancroft, 32 Vt. 867.	502
Vicksburg v. Lowry, 61 Miss. 102; 48 Am. Rep. 76.	380	Wert v. Clutter, 57 Ohio St. 847.	402
Vilas v. Mason, 25 Wis. 310.	51	West v. Snodgrass, 17 Ala. 549.	761
Vincent v. Rogers, 30 Ala. 471; 33 Ala. 224.	593	Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.	347
Vinton v. King, 4 Allen. 562.	127	Westmoreland v. Foster, 60 Ala. 448.	28
Vrooman v. Jackson, 6 Hun. 329.	447	West Phila. Pass. Ry. Co. v. Whipple, 5 W. N. Cas. 68.	116
Wainwright v. McCullough, 63 Penn. St. 49.	741	Western & A. R. Co. v. Strong, 52 Ga. 461.	837
Wakefield v. South Boston R. Co., 117 Mass. 544.	863	Western, etc., R. Co. v. Bishop, 50 Ga. 495.	837
Walan v. Kerby, 99 Mass. 1.	219	Western College v. Cleveland, 12 Ohio St. 375.	868
Waldele v. N. Y. C. & H. R. R. Co., 95 N. Y. 234; 47 Am. Rep. 41.	507	Western Ins. Co. v. Riker, 10 Mich. 279.	347
		W. U. Tel. Co. v. Adams, 87 Ind. 598; 44 Am. Rep. 776.	757
		W. U. Tel. Co. v. Buchanan, 39 Ind. 427; 9 Am. Rep. 774.	757
		Western Union Tel. Co. v. Jones, 95 Ind. 228; 48 Am. Rep. 713.	757
		W. U. Tel. Co. v. Pendleton, 95 Ind. 12; 48 Am. Rep. 692.	42, 401, 758
		Wetheres's Lessee v. Bascoville.	81

	PAGE.		PAGE.
Wetherill v. Neilson, 20 Penn. St. 448...	739	Wilson v. New Bedford, 106 Mass. 231-236; 11 Am. Rep. 352...	557
Weymire v. Wolfe, 52 Iowa, 533...	362	Wilson v. Raastail, 4 Term. Rep. 753...	550
Weymouth v. Ry. Co., 17 Wis. 550...	363	Wilson v. Raybould, 56 Ill. 417...	614
Whaley v. Galliard, 21 S. C. 753...	376	Wilcox v. Smith, 5 Wend. 231; 21 Am. Dec. 212...	442
Wheaton v. Beecher, Sup. Ct. Mich., June 16, 1837...	601	Wilcox v. Toledo, etc., R. Co., 43 Mich. 584...	354
Whedbee v. Stewart, 40 Md. 414...	760	Wilson v. State, 16 Ind. 303...	580
Wheelwright v. Wheelwright, 2 Mass. 447...	691	Wilson v. Waddell, 2 App. Cas. 95...	341
Whitaker v. Eastwick, 75 Penn. St. 232...	739	Wilson v. Will. & Man. R. Co., 10 Rich. Law. 52...	478
Whitaker v. Sandifer, 1 Duval, 361, 337, 339...	629	Winans v. Ailemania F. Ins. Co., 38 Wis. 342...	572
Whitcomb v. Joslyn, 51 Vt. 79; 31 Am. Rep. 678...	56	Winchester v. Craig, 63 Mich. 205...	353
White v. Carroll, 43 N. Y. 161; 1 Am. Rep. 503...	401	Winchester v. Stevens' Point, 58 Wis. 350...	330
White v. Concord R. Co., 30 N. H. 207...	704	Wing v. Ralley, 14 Mich. 83...	366
White v. Core, 20 W. Va. 272...	50	Wingate v. Mechanics' Bank, 10 Penn. St. 104...	731
White v. Haffaker, 27 Ill. 349...	550	Winter v. Landphere, 42 Iowa, 471...	231
White v. Nichols, 3 How. 201...	677	Wintou's Appeal, 97 Penn. St. 395...	745
White v. Port Huron, etc., R. Co., 13 Mich. 356...	366	Wiser v. Chesley, 53 Mo. 547...	118
White v. Rittenmeyer, 30 Iowa, 268...	417	Wireback v. First Nat. Bank, 97 Penn. St. 542...	411
Whitehead v. Kitson, 119 Mass. 484...	138	Witzel v. Charleston, 7 S. C. 88...	230
Whitehouse v. Fellowes, 10 C. B. (N. S.) 763...	339	Wollacraft v. Morton, 15 Wis. 196...	623
Whitesides v. Jennings, 19 Ala. 784...	604	Wolters, Ex parte, 65 Cal. 289...	17
Whitford v. Panama R., 23 N. Y. 465, 472...	143	Wood v. Appal, 63 Penn. St. 210...	741
Whitney Arms Co. v. Barlow, 68 N. Y. 62; 20 Am. Rep. 504...	356	Wood v. Erie R. Co., 73 N. Y. 196; 29 Am. Rep. 125...	726
Whitney v. Bigelow, 4 Pick. 119...	750	Wood v. Ingraham, 3 Stro. 105...	237
Whitney v. Union Ry. Co., 11 Gray, 359...	387	Wood v. Mallett, 7 Ohio St. 172...	102
Wieland v. Koblok, 110 Ill. 16; 51 Am. Rep. 676...	56	Wood v. Partridge, 11 Mass. 458...	23
Wilbur v. Gilmore, 21 Pick. 250...	143	Wood v. Surralls, 59 Ill. 107...	797
Wilcoxon v. Donnelly, 30 N. C. 245...	27	Wood v. Wood, 5 Paige, 596; 28 Am. Dec. 451...	495
Wilde v. Raulings, 1 Head, 84...	675	Woodward v. Clark, 3 Stro. Eq. 170...	256
Wiley v. Wilson, 77 Ind. 596...	413	Woodward v. Dean, 113 Mass. 237...	123
Wilkins v. Allen, 18 How. 285...	80	Woodward v. Foster, 18 Gratt. 200...	799
Williams v. Burrell, 50 E. C. L. 401...	604	Woolfolk v. Macon, etc., R. Co., 56 Ga. 457...	704
Williams' Case, 3 Bland Ch. 133, 259...	504	Word v. Vance, 1 N. & McC. 197; 9 Am. Dec. 683...	56
Williams v. Jones...	502	Wright v. Blakeslee, 101 U. S. 174...	504
Williams v. Natural Bridge P. R. Co., 21 Mo. 580...	302	Wright v. DeFrees, 8 Ind. 298...	381
Williams v. Pearson, 38 Ala. 299...	599	Wright v. Hartford F. Ins. Co., 36 Wis. 523...	572
Williams v. Pomeroy Coal Co., 37 Ohio St. 583...	343	Wusthoff v. Dracourt, 3 Watte, 240...	77
Williams v. Schatz, 43 Ohio St. 47...	289	Wyatt v. Buell, 47 Cal. 624...	578
Williams v. South, 7 Iowa, 434...	101	Xenos v. Wickham, 106 E. C. L. 381, 435...	285
Williams v. State, 8 Humph. 565; 7 Tex. Ct. App. 163; 12 Tex. Ct. App. 127...	532	Yates v. Lansing, 9 Johns. 395; 6 Am. Dec. 290; 1 Burr's Trial, 352...	380
Williams v. Wash. L. Ins. Co., 31 Iowa, 511...	852	Yorton v. M., L. S. & W. R. Co., 54 Wis. 234...	361
Williams v. Williams, 55 Wis. 300; 42 Am. Rep. 708...	64	Young v. Bradley, 68 Ill. 553...	424
Williamson v. Cambridge R. Co., Mass. Sup. Jud. Ct., Feb. 23, 1837...	566	Young & Conant Manuf. Co. v. Wakefield, 121 Mass. 91...	127
Williamson v. Holmes, 4 Rich. Eq. 476...	257	Younge v. Guilbean, 3 Wall. 638...	238
Willis v. Twamby, 13 Mass. 204...	55	Zacharie v. Nash, 13 La. 20...	199
Willoughby v. Thomas, 24 Gratt. 522...	827	Zimmerman v. Steeper, 75 Penn. St. 147...	233
Wilson v. Arentz, 70 N. C. 670...	95	Zook v. Simonson, 72 Ind. 83...	46
Wilson v. Black, 6 Blackf. 508...	799	Zoeblach v. Turbille, 10 Allen, 385...	389
Wilson v. Joseph, 107 Ind. 490...	43		
Wilson v. Mayor, 1 Deulo, 595; 43 Am. Dec. 719...	232		

CASES OVERRULED, DOUBTED AND DENIED.

- Allen v. Merchants' Bank of New York** (15 Wend. 482; 22 Wend. 215), denied;
Merch. Nat. Bk. of Phila. v. Goodman (109 Penn. St. 422), 731.
- Bay v. Coddington** (5 Johns. Ch. 54; 9 Am. Dec. 268), denied; **Spencer v. Sloan** (108 Ind. 183), 39.
- Belles v. Belles** (7 Halst. 389), doubted; **Gunn v. Gunn** (74 Ga. 555), 451.
- Bissell v. Collins** (28 Mich. 277), doubted; **Robert v. Sadler** (104 N. Y. 229), 500.
- Lranch v. Levy** (46 N. Y. Super. 428), overruled; **Becker v. Koch** (104 N. Y. 394), 521.
- Carpenter v. Carpenter** (45 Ind. 142), denied; **Rice v. Boyer** (108 Ind. 472), 56.
- Cauley v. Pittsburgh, etc., Ry. Co.** (95 Penn. St. 398; 40 Am. Rep. 664), doubted; **Indianapolis, etc., Ry. Co. v. Pitzer** (100 Ind. 179), 397.
- Clayton v. Johnson** (36 Ark. 406; 38 Am. Rep. 40), overruled; **Collier v. Davis** (47 Ark. 367), 759.
- Clayton v. Johnson** (36 Ark. 406; 38 Am. Rep. 40), denied; **Greeley v. Dixon** (21 Fla. 413), 674.
- Conrad v. Lane** (26 Minn. 389), denied; **Rice v. Boyer** (108 Ind. 472), 56.
- Corcoran v. Boston & A. R. Co.** (133 Mass. 507), denied; **Burns v. Chicago, etc., Ry. Co.** (69 Iowa, 450), 228.
- Cordell v. N. Y. Cent., etc., R. Co.** (75 N. Y. 330; 26 Am. Rep. 550), denied; **Burns v. Chicago, etc., Ry. Co.** (69 Iowa, 450), 229.
- Danner's case** (4 Rich. 329), denied; **Savannah, etc., Ry. Co. v. Geiger** (21 Fla. 669), 698.
- Eaton v. Delaware R. Co.** (57 N. Y. 382; 16 Am. Rep. 513), denied; **Hanson v. Mansfield Ry., etc., Co.** (38 La. Ann. 111), 165.
- Edwards v. Sanders** (6 S. C. 316), overruled; **McLure v. Melton** (24 S. C. 559), 274, 275.
- Ex parte Robinson** (2 Biss. 309), denied; **New v. Walker** (108 Ind. 365), 41.
- Fox v. Adams** (5 Me. 245), denied; **Greeley v. Dixon** (21 Fla. 413), 674.
- Gandell v. Pontigny** (4 Camp. 375), denied; **James v. Allen County** (44 Ohio St. 226), 823, 826.
- Gulich v. Turnpike Co.** (14 N. J. L. 545), denied; **Gunn v. Gunn** (74 Ga. 555), 451.
- Huntington v. O. & L. C. R. Co.** (33 How. Pr. 416), denied; **James v. Allen County** (44 Ohio St. 226), 824.
- Jones v. C. & G. R. Co.** (20 S. C. 249), denied; **Savannah, etc., Ry. Co. v. Geiger** (21 Fla. 669), 698.
- Kelly v. Ruble** (11 Oreg. 75), denied in part; **Gee v. McMillan** (14 Oreg. 268), 317.

xxxviii CASES OVERRULED, DOUBTED AND DENIED.

- King v. Watson (3 Exch. 6), denied; Greeley v. Dixon (21 Fla. 413), 674.
Kittlewell v. Steward (8 Gill. 472), denied; Greeley v. Dixon (21 Fla. 413), 674.
Marks v. Baker (28 Minn. 162), doubted; Jones v. Townsend's Admr's (21 Fla. 431), 681.
McCall v. Hinkley (4 Gill. 128), denied; Greeley v. Dixon (21 Fla. 413), 674.
Mechanics' Bank v. Gorman (8 W. & S. 354), denied; Greeley v. Dixon (21 Fla. 413), 674.
Missouri Valley Ins. Co. v. Sturgess (18 Kans. 93; 26 Am. Rep. 761), denied; Bursinger v. Bank of Watertown (67 Wis. 75), 849.
Morrow v. Wood (35 Wis. 59; 17 Am. Rep. 471), doubted; State v. Webber (108 Ind. 31), 34.
Nightingale v. Harris (6 R. I. 321), denied; Greeley v. Dixon (21 Fla. 413), 674.
Perley v. County of Muskegon (32 Mich. 132; 20 Am. Rep. 637), denied; Wolfe v. State (79 Ala. 201), 592.
Rankin v. Lodor (21 Ala. 380), denied; Greeley v. Dixon (21 Fla. 413), 674.
Riley v. Railroad Co. (135 Mass. 292), denied; Burns v. Chicago, etc., Ry. Co. (69 Iowa, 450), 229.
Rulison v. Post (79 Ill. 567), doubted; State v. Webber (108 Ind. 31), 34.
Sherry v. Frecking (4 Duer, 457), denied; Ezzard v. Findley Gold Mining Co. (74 Ga. 520), 446.
Sims v. Everhardt (102 U. S. 300), denied; Rice v. Boyer (108 Ind. 472), 56.
State v. Kevin (8 Neb. 63), denied; Wolfe v. State (79 Ala. 201), 592.
Strauss v. Meertief (64 Ala. 299; 38 Am. Rep. 8), denied; James v. Allen County (44 Ohio St. 226), 824.
Thompson v. Wood (1 Hilt. 96), denied; James v. Allen County (44 Ohio St. 226), 834.
Thorogood v. Bryan (8 C. B. 115), denied; Holzap v. N. O., etc., R. Co. (38 La. Ann. 135), 179.
Trustees v. People (87 Ill. 303; 29 Am. Rep. 55), doubted; State v. Webber (108 Ind. 31), 34.
Valle v. Obenhouse (62 Mo. 81), overruled; Dyer v. Wittler (89 Mo. 81), 96.
Ward v. Berkshire Life Ins. Co. (108 Ind. 301), denied; Rice v. Boyer (108 Ind. 472), 56.
Whitcomb v. Joslyn (51 Vt. 79; 31 Am. Rep. 678), denied; Rice v. Boyer (108 Ind. 472), 56.
Wieland v. Kobick (100 Ill. 16; 51 Am. Rep. 676), denied; Rice v. Boyer (108 Ind. 472), 56.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PIERCE V. GUITTARD.

(88 Cal. 68.)

Trade-mark — infringement.

The plaintiff manufactured and sold chocolate under the description of "German Sweet Chocolate," having obtained authority to use it from Samuel German, the original proprietor. The defendant, with intent to get plaintiff's customers, manufactured and sold chocolate under the description of "Sweet German Chocolate." *Held*, that the defendant should be restrained therefrom.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

Charles P. Eells and John Sherwood, for appellant.

Wheaton & Harpham, for respondents.

Ross, J. The complaint alleges that the plaintiff, for more than thirteen years next preceding the commencement of this action, has been, and still is, engaged in the manufacture and sale of a chocolate called and known as "German Sweet Chocolate," "the name of German being that of one Samuel German, who was on and before the 1st of June, 1867, employed, and who has ever since been and is now employed, by plaintiff in the manufacture of the said

chocolate, and who on said 19th of June, 1867, for a valuable consideration, duly assigned and transferred to the plaintiff the exclusive right to use his, the said German's, name upon the said chocolate so as aforesaid made and manufactured, and upon the labels and cases containing the same, and generally to use the said name of German as a trade-mark therefor;" that the chocolate has long been well and favorably known in the trade and to the public generally by the name of "German Sweet Chocolate," and has been and is now extensively sold under that name, and now is and for a long time has been the source of large profits to the plaintiff; that during the time mentioned it had been and still is put up by the plaintiff in the form of a cake of about five inches in length and two and one-half inches in width, each cake inclosed in a wrapper and label, which has on a gilt background a green panel with arabesque border, in the center of which is a white star surrounded by the words "German Sweet Chocolate;" that the said wrapper and label with the said words and figures thereon were appropriated by plaintiff to his exclusive use as a trade-mark to designate the origin and ownership of said "German Sweet Chocolate," and has been such ever since; that the defendants, for more than four years last past, have been and still are manufacturing and selling an inferior article of chocolate in the form of a cake similar in shape to the "German Sweet Chocolate" of the plaintiff, put up in wrappers and labels of about the same size and shape as the plaintiff's, and bearing the words "Sweet German Chocolate" in a green panel on a yellow or gilt background, with arabesque pattern; that the wrappers and labels of the defendants are fraudulent imitations of those of the plaintiff, and were and are calculated and intended by the defendants, and each of them, to deceive dealers and purchasers, and to mislead them into using their inferior article, instead of and as and for the chocolate manufactured by the plaintiff, and has had and continues to have that effect to the serious injury of the plaintiff. And the plaintiff prays a decree restraining defendants from making or causing to be made, or in any manner using wrappers or labels having upon them the words "Sweet German Chocolate," or any words, figures, or designs resembling or imitating the words, figures, and designs used by the plaintiff as his trade-mark, and also for an accounting of profits alleged to have been made by defendants out of the alleged fraudulent sales, and for damages.

Pierce v. Guittard.

At the trial plaintiff was nonsuited, and the appeal is from the judgment given against him, as also from an order refusing him a new trial.

The plaintiff, after giving evidence that for many years he has manufactured at Dorchester, Massachusetts, a chocolate under the name of "German Sweet Chocolate," put up in the form and manner stated in the complaint, and sold throughout the country, testified as follows: "I applied the name of 'German Sweet Chocolate' to that chocolate at Dorchester in 1866. I applied it because it was a good name, and I wished to place upon the market a new brand of sweet chocolate of improved manufacture. I got the name from Samuel German, and he authorized me to use it. In June, 1866, about the time I commenced the manufacture, I obtained it because I wanted to use his name, and I wanted his authority to use it. In the earlier years of the manufacture by me of 'German Sweet Chocolate,' Samuel German was personally engaged in the manufacture of it, but owing to his advancing age and infirmities, he has been given lighter work to do since. The 'German Sweet Chocolate' has been sold and known to the trade under that name, and by the labels I have mentioned since 1866. At the time I had adopted the name and those labels no other chocolate was sold or known to the trade under similar symbols, or under a name of which the word 'German' formed a part. I appropriated the name 'German Sweet Chocolate, made by S. German, Dorchester, Mass.,' to my exclusive use, as a trade-mark for that chocolate, with the design, symbol, and device as appear by the labels I have mentioned, and I still claim the same, as I always have, as my trade-mark."

The witness gave further testimony tending to show that he has ever since sold his chocolate extensively throughout the United States and received pecuniary profits therefrom, and that the chocolate sold by the defendants under the name of "Sweet German Chocolate" is of inferior quality. Other witnesses testified that the chocolate sold by defendants is inferior to that of the plaintiff, and is bought by the jobbers at a less price than plaintiff's chocolate can be bought for, and is retailed by them to the public as and for the "German Sweet Chocolate" of the plaintiff.

A witness named Doyle testified on behalf of the plaintiff that he was in the employ of the defendants as foreman at the time their label was gotten up, and had formerly been connected with a large

house in New York that had the New York agency for Walter Baker & Co., of which firm the plaintiff was sole member, and that he was consulted by defendants in regard to the name to be put on their label; that defendant Guittard asked him what Walter Baker & Co. called their chocolate, and he replied "German Sweet Chocolate, when Guittard said: "We will reverse it, and call ours Sweet German Chocolate." This witness further testified: "I had many conversations with Guittard about Baker's chocolate before the one I have mentioned. The object of those consultations was to get at Baker's customers, whom I knew, being connected with the house that was their New York agent. That was the beginning of the consultations about Baker. He asked me who were the largest customers we had for Baker's goods in consultations we had, and I gave him the name of the large firms in Philadelphia, New York, Chicago, etc., to whom he sold his Sweet German Chocolate."

Upon this state of facts, which as the case is presented we must accept as true, we are of opinion that it is not necessary to decide whether the plaintiff's label with the accompanying words and devices constituted a trade-mark, and as such the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a representation to the name or mark. *Lee v. Haley*, L. R., 5 Ch. App. 155. "Equity gives relief," said the Supreme Court of the United States in *McLean v. Fleming*, 96 U. S. 251, "upon the ground that one man is not allowed to offer his goods for sale representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. Where therefore a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of the goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp; because by doing so he would be substantially

Hand v. Hand.

representing the goods to be the manufacture of the person who first adopted the stamp, and so would, or might be, depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy."

That the unlawful purpose was deliberately designed and effectuated clearly appears from the testimony given at the trial. The motion for nonsuit should therefore have been denied.

Judgment and order reversed, and cause remanded for a new trial.

Judgment reversed and cause remanded.

MORRISON, C. J., MYRICK and McKEE, JJ., concurred.

Rehearing denied.

HAND V. HAND.

(88 Cal. 125.)

Marriage — estoppel of married woman by acknowledgment.

The plaintiff was married in 1855, in England, to a man who was then and ever since has been a resident of that country. From 1868 to 1878 she lived in adultery with the defendant in California, passing as his wife, but he being cognizant of her marriage. In 1878 she conveyed to the defendant lands in California, acknowledging the deed as a single woman. *Held*, that she could not avoid the deed for that reason. (*See note, p. 7.*)

SUIT to quiet title. The opinion states the case. The defendant had judgment below.

George D. Shadborn, for appellant.

Lloyd & Wood, for respondent.

MORRISON, C. J. This case, which comes before us on the judgment roll, is a suit to quiet title to certain lots of land in the city of San Francisco. It is conceded that the property in question was at one time owned by the plaintiff, it having been purchased and paid for with her separate funds. But it is claimed that the defendant has succeeded to the ownership thereof by virtue of certain instruments, executed by the plaintiff to the defendant. The sufficiency of those instruments to convey the title is the question before us. It was held in the Superior Court that the defendant

had acquired the title of the plaintiff, and judgment was rendered in his favor. The appeal is from the judgment.

It appears from the findings in the case that the plaintiff was a married woman, her husband being a resident of England, but for a great many years living separate and apart from her husband. As early as 1863, a meretricious union was formed by plaintiff and defendant, and they had lived in California as husband and wife from 1863 down to the year 1878. The first finding is: "that plaintiff is, and ever since the sixth day of October, 1855, hath been, the lawful wife of one William Nickels."

"2. That during all this time the said William Nickels hath been and still is a resident of Colchester, England, and hath never been in the State of California, or in the United States of America.

"3. That plaintiff and said Nickels have not lived or cohabited together since 1863, but that plaintiff and defendant lived and cohabited together as husband and wife from 1863 to 1878; that plaintiff has been a resident of this State continuously since 1868:"

It is conceded on both sides that the certificate of acknowledgment to the deed attempting to convey the property in question, made by plaintiff to defendant under the name of Mary Ann Hand, on the thirteenth day of August, 1873, is not in the form prescribed by the statute for the deeds of married woman, but as the eleventh finding shows, is in the form prescribed by the statute for the acknowledgment of a *feme sole*, and not in the form prescribed for the acknowledgment of a married woman. Afterward, to-wit, on the twenty-seventh day of July, 1878, she executed another instrument to the defendant, acknowledged in like manner, which said instrument was in the name of Mary Ann Halls.

But was the conduct of the plaintiff such as to take from her the right to invoke the statute referred to for the purpose of defeating her deed? We are of the opinion that it was. During the entire period of her residence in California, she was never known as the wife of Nickels, but passed as the wife of Hand, with whom she was living as his wife, but to whom it is not pretended she ever was married; and a part of the time she passed by her maiden name of Mary Ann Halls. Indeed, she had done all she could do, in the absence of a legal divorce, to separate herself from her lawful husband, and after many years ignoring her husband, she seeks to avail herself of the plea of marriage to defeat an instrument made and delivered by her as her deed. This case does not differ in principle from that

Hand v. Hand.

of *Reis v. Lawrence*, decided by this court, and reported in 63 Cal. 129; s. c., 49 Am. Rep. 87. See also *Rosenthal v. Mayhugh*, 33 Ohio St. 155; s. c., 49 Am. Rep. 87.

There are other points made by the respondent, but it is not necessary to consider them, as we think the judgment must be affirmed on the one already stated.

Judgment affirmed.

MYRICK, J., concurred; THORNTON, J., concurred in the judgment.

ROSS, J., concurring. I agree that the plaintiff should be regarded as a single woman. The property to which she asserts title was acquired by her in this State. Her husband has never been within the United States. For twenty odd years she has repudiated her marital relations, and conducted herself without regard to them. Under such circumstances, to permit her to fall back upon them and avoid her deed, on the ground that the certificate of the notary does not recite that she was examined "separate and apart" from her husband, with whom she has held no relations for more than twenty years, and who has never been in this country, seems to me to be beyond all reason. I therefore concur in the conclusion reached by the chief justice.

NOTE BY THE REPORTER. — MCKEE, J., dissenting, said: "I think the decision is against the evidence and law, because, as the conveyance of the separate estate of a married woman, the alleged deed was a nullity. A married woman, although living adulterously with another, can convey her separate real property without the consent of her husband. But the law has regulated for her, as it has done for every one capacitated to transfer property, the mode by which she may transfer her separate real property, and she cannot transfer it in any other mode than that prescribed by the law.

"But it is insisted that as the plaintiff acted and represented herself as a *feme sole*, she is estopped to deny the validity of the instrument as a conveyance.

"That assumption is not founded in the facts of the case. There was no evidence given that she acted and represented herself as a *feme sole*. Certainly not to the defendant, for he all along knew her true *status*. It is true that she concealed from the public the fact that she was the wife of Nickels; but defendant, as her paramour, was not ignorant of the fact; he knew it all along, and joined the plaintiff in promulgating the falsehood as to her marital relations with another. As *particeps criminis*, how then, was the defendant deceived by any act or representation of the plaintiff?

"As I understand it, the doctrine of estoppel can only be invoked to preclude a party who has made a false representation knowingly, with intent

Brown v. Sennett.

that it should be acted upon, from denying its truth as against the party to whom it was made, provided the latter was ignorant of its falsity, and believing it to be true, acted upon it to his damage. *Davis v. Davis*, 26 Cal. 23. On that principle a majority of this court decided the case of *Reis v. Lawrence*, 63 Cal. 129. But there is in this case no feature in common with that. In that *Reis* was an innocent party; in this the defendant was not. In that the woman acted fraudulently and upon a false representation, to the damage of *Reis*; in this the woman made no false representation to the defendant. He was therefore neither deceived nor injured by any act or representation of her. The court finds: 'That during all of the time from 1863 to 1880 the defendant well knew and had knowledge that plaintiff was the wife of said William Nickels;' and there was no evidence, and there is no finding that the defendant ever paid a single dollar to the plaintiff, not even the nominal consideration mentioned in the alleged deed. That being the case, the title to the property in controversy 'stood of record' in the name of the plaintiff at the commencement of the action, and according to the agreement of the defendant it belonged to her, 'free and clear of any claim or demand' by him."

BROWN V. SENNETT.

(68 Cal. 235.)

Master and servant — fellow-servants — alter ego.

A stevedore's foreman, to whom is intrusted the supervision and control of unloading a vessel, is not a fellow-servant with the laborers employed by him.

ACTION for negligence producing death of plaintiffs' husband and father. The opinion states the case. The defendant had judgment below.

George Turner, Mich. Mullany, and E. A. Lawrence, for appellants.

Mastick, Belcher & Mastick, for respondents.

McKNEE, J. The plaintiffs in the action in hand are the widow and children of John Brown, deceased, and they sue the defendant to recover damages for the commission of a wrongful act, or negligence by him, which it is alleged caused the death of the deceased.

The case was tried by the court without a jury. At the conclusion of the evidence given for the plaintiffs, there was a motion made for a nonsuit, which was granted; and afterward a motion

Brown v. Sennett.

for a new trial, made on a statement of the case, was denied; and from the judgment of nonsuit and the order denying the motion the plaintiffs have appealed.

The statement of the case shows that the defendant was a stevedore, who in January, 1881, contracted to unload the British ship *Glengarry*, then lying at Pacific Street wharf, in San Francisco, with a cargo of coal. For the performance of his contract he provided himself with a stationary engine, with the usual gear and apparatus for hoisting the coal from the hold and dumping it into a hopper or screen on the wharf; and employed the requisite number of men to serve in the positions necessary for discharging.

The machinery consisted of a steam-engine located on the wharf; and the apparatus consisted of four coal tubs or buckets, each of sufficient size to hold about a thousand pounds of coal, with a hoisting-gear on each; and the hoisting-gear was attached by a block and pulleys to a pennant or wire rope, so stretched from the main-top-mast to the foremast as to fix the point of attachment directly over the hatch.

There were twelve or thirteen men employed. One acted as foreman, who had in his position on the deck of the ship control and direction of the men and of the work; another as engineer, whose position was at the hoisting-engine on the wharf. Three, including the foreman, were stationed on deck near the hold, one of them in charge of a line whereby he controlled the tub as it was hoisted from the hold until it cleared the hatch; another to work a trip-line, fastened at the bottom and center of the tub, by which, when the tub was hoisted to the hopper, the coal was dumped from the tub into the hopper; and another in charge of a line by which the emptied tub was controlled and returned through the hatch to the floor of the ship. To fill or refill the tubs, eight men were stationed directly under the open hatchway, two men for each tub, whose sole duty was to shovel the coal into the tubs, and when each tub was filled to attach the rope-hook thereto, and steady it in its ascent until it cleared the hatchway. For that purpose John Brown was one of the men employed.

The men were competent and skillful to perform the duties assigned to them; and the hoisting machinery and tackle were all in good order.

On the second day of unloading, the shovelers had worked down to the "skin" or floor of the ship, where they cleared a space of

about three feet on the floor, directly under the hatch, and about twenty feet below the deck, the coal being around the space for a height of about fifteen feet. In this space two of the shovelers, John Joyce and a man named Frenchie, hurriedly filled their tub unusually high, "higher," a witness testified, "than the edge of the tub. As near as I could judge, there was about four hundred pounds on the tub, above the edge of the tub." Loaded in that way the engine was signaled to start it. It was started and safely hoisted clear of the hatchway; but when above the hatch the tub began to rock and swing, and in that condition it was hoisted until it swung against the mainstay, thirty feet from the deck, with such force that it tilted over, and three hundred or four hundred pounds of the coal fell out, back into the hold and upon the head of Brown, causing his death.

There is no doubt that Joyce and Frenchie were fellow-servants of Brown; and if their wrongful act caused Brown's death, the defendant, as their common employer, would not be liable (*Hogan v. U. P. R.*, 49 Cal. 128; *McLean v. Blue Pl. M. Co.*, 5 Cal. 257; *McDonald v. Hazletine*, 53 Cal. 35); and the nonsuit was properly granted.

But while the evidence tended to show that the act of overfilling the tub may have contributed to the accident, there was also evidence which tended to show that the accident resulted from the swinging of the overloaded tub against the mainstay, and that that could have been prevented "by stopping the engine a second, so as to let the tub swing away from the stay." According to the evidence, when the tub cleared the hatch, there was nothing to obstruct its ascent until it came to the stay. From his position on the deck the duty devolved on the foreman to superintend and control the hoisting. By the sound of his whistle he could signal the hoisting-engine to start or to stop. He did not signal the engine to stop, and the overloaded bucket was hoisted in its eccentric course until it struck the stay and tilted over with the disastrous consequences to the workman.

Assuming as fact that the omission to signal the engineer to stop was the cause of the catastrophe, the question arises, is the defendant legally liable for the neglect of his foreman?

Undoubtedly the foreman and other men engaged in discharging the cargo were all working for the defendants; they were therefore employees of the defendants, and the relation of master and servant existed between them.

Brown v. Sennett.

But the case also shows that the defendants abdicated the control and management of the entire work to the foreman, and gave him full discretion to control and supervise it. "I was," testified the foreman, "foreman of the job, * * * and superintended it for them. * * * I employed the men for them, and they paid us all." Under that delegated power the foreman was therefore in the performance of the "job" in place of the master.

That being the case, the defendants would be liable for any neglect of their foreman in the performance of the work, to the same extent that they would be liable for their own neglect if they had personally controlled and supervised it. Where employers owe a duty to their servants in the performance of work contracted to be performed, and for which the servants were employed, they are responsible to their servants for the manner of its performance.

The general rule upon the subject has been quoted from Shearman and Redfield on Negligence, section 102, and approved by this court in *Beeson v. Green Mountain Co.*, 57 Cal. 31. The rule is this: "One to whom his employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a fellow-servant with those employed under him; and the master is answerable to all the under-servants for the negligence of such managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants. Such, at least, appears to us to be the rule sanctioned by the weight of authority and by sound reason, though it must be admitted that it is not everywhere established by law." It is said: "The contrary rule prevails in Massachusetts." But Chief Justice BIGELOW, in *Sweeney v. Old Colony and Newport Railroad Co.*, 10 Allen, 377, states the rule as follows: "If a person undertake to do an act or discharge a duty, by which the conduct of others may properly be regulated and governed, he is bound to perform it in such a manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence."

The fact that the master exercised due care in the selection of the person to whom he delegated his power and supervision of the work does not affect the rule which holds him responsible to his servants for the manner in which the work is performed; and if in

Matter of Yick Wo.

the performance, death or injury results to a servant from the wrongful act or negligence of the person who is controlling and supervising the performance in place of the master, the master is liable; and the rule exempting him from liability for such injuries caused by the negligence of a fellow-servant has no application. *Trask v. Cal. S. R.*, 63 Cal. 96. The nonsuit was improperly granted.

Judgment and order reversed, and cause remanded for a new trial.

Judgment reversed and cause remanded.

MORRISON, C. J., and MYRICK and THORNTON, JJ., concurred.

MATTER OF YICK WO.

(68 Cal. 294.)

Constitutional law — regulation of laundries.

Under a statute authorizing a city to prohibit the erection of wooden buildings within limits where streets have been graded, it is competent to ordain that no laundry shall be carried on without special permit, unless in a brick or stone building.

HABEAS corpus. The opinion states the case.

Hall McAllister, L. H. Van Schaick, and D. L. Smoot, for petitioner.

Alfred Clarke, for respondent.

SEARLS, C. 1. Yick Wo, a native of China, came to the United States in 1861, and for twenty-two years last past has been engaged in the laundry business at 349 Third street, San Francisco.

2. Petitioner is an alien and a subject of the emperor of China.

The petition for a writ of *habeas corpus* was filed August 24, 1885, and a writ issued returnable September 4, 1885. The return shows that petitioner is held by the respondent as sheriff of the city and county of San Francisco, under a conviction and sentence for a violation of section 1 of order 1569 and section 68 of order 1587 of the board of supervisors of the city and county of San Francisco.

Matter of Yick Wo.

Ordinance or order No. 1569 of the board of supervisors, under which the petitioner was convicted, is in the following language:

ORDER NO. 1569.—PRESCRIBING THE KIND OF BUILDINGS IN WHICH LAUNDRIES MAY BE LOCATED.

The People of the City and County of San Francisco do ordain as follows :

SEC. 1. It shall be unlawful from and after the passage of this order for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors; except the same be located in a building constructed either of brick or stone.

§ 2. It shall be unlawful for any person to erect, build or maintain, or cause to be erected, built or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and said scaffolding shall not be used for any other purpose than that designated in such permit.

§ 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than \$1,000, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

In board of supervisors, San Francisco, May 24, 1880.

After having been published five successive days according to law, taken up and passed by the following vote:

Ayes—Supervisors Schottler, Mason, Litchfield, Drake, Whitney, Eastman, Fraser, Taylor, Doane, Bayley, Torrey, Stetson.

Approved, SAN FRANCISCO, May 26, 1880.

JNO. A. RUSSELL, *Clerk.*

I. S. KALLOCH,

Mayor, and ex-officio President Board Supervisors.

Section 68 of order 1587, passed July 28, 1880, is in substance and effect the same as section 1 of No. 1569, quoted above.

It is admitted that petitioner had a license, a certificate from the board of fire wardens, and a certificate from the health officer, copies of which are on file.

It is further admitted that petitioner applied to the board of supervisors, June 1, 1885, for consent of said board to maintain and carry on his laundry, but that said board refused said consent.

By section 2 of article 11 of the Constitution of this State, it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

By section 74 of the act of April 19, 1856, usually known as the Consolidation Act, the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases, * * * to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded, * * * to regulate the sale, storage, and use of gunpowder or other explosive or combustible materials and substances, and make all needful regulations for protection against fire. To make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community. 2 Kent Com. 340.

Every citizen holds his property subject to the proper exercise of the powers and restrictions above referred to.

A large proportion of the laws and ordinances relating to the comfort, safety, health, convenience, good order, and general welfare of the inhabitants of cities and towns, and which we style police laws and regulations, have the effect in a greater or less degree to disturb and curtail individual enjoyment and personal rights.

For the injury which the citizen suffers, he is, in contemplation of law, compensated by his share in the general benefits flowing from the regulations, found essential to the general welfare. It is but a

Matter of Yick Wo.

reasonable restraint upon the use of property in those cases, where its unlimited use or enjoyment would produce serious mischief to others.

The right to establish fire limits, and to interdict the construction of wooden buildings within certain specified bounds, is a familiar exercise of the authority usually conferred upon municipal corporations.

In towns like San Francisco, constructed largely of wood, the danger from fire is ever present and overshadowing.

It is not therefore strange that the legislature, in conferring certain powers upon the municipal authorities of the city, included not only the authority to regulate the erection, but also the use of building, so far as necessary for the safety of the inhabitants.

To prevent the construction of wooden buildings within the densely inhabited portions of a city may become an imperative duty on the part of the authorities. They may not destroy those already erected. But the use of wooden structures within given limits, for specific and highly dangerous purposes, may become quite as detrimental as the erection of new structures of the same character; and as the power of regulation extends to the use as well as to the erection of wooden buildings, we can discern no assumption of unwarranted authority in the order No. 1569 which interdicts the establishing, maintaining, or carrying on laundries, except by consent of the board of supervisors, save in brick or stone buildings. The business of conducting a laundry involves a constant use of fires, under circumstances, and perhaps by persons, liable to result in conflagrations; of these facts the supervisors are the judges.

In given instances under favorable circumstances, the danger of fire from this business may be reduced to a minimum, or may not at all jeopardize the surrounding property. In this last class of cases, no objection can be seen why permits should not be granted, as provided for in order 1569. It has been the practice in municipal corporations to vest the granting of licenses for a variety of objects in the discretion of the corporate authorities, or some of them. Without such authority, boards of health and various other agencies by which the lives and health of citizens, and the safety and due enjoyment of their property are protected, would be powerless for good.

The argument that the discretion to permit the establishment of laundries in wooden buildings by the supervisors is liable to abuse,

cannot be held conclusive. No doubt all power is liable to abuse, wheresoever lodged.

In theory however, as well as in ordinary practice, the persons selected to discharge governmental duties, by reason of supposed qualifications for the several positions in which they are placed, will be found to possess the capacity and integrity essential to a proper administration of the trust reposed in them.

If they prove deficient in these qualifications, the evil cannot be remedied by invalidating their acts, performed by virtue of authority vested in them, or where they have exercised discretionary powers, by impugning their judgment or motives, rather than their right to exercise the discretion.

The board of supervisors, under the several statutes conferring authority upon them, has the power to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety.

Clothes-washing is certainly not opposed to good morals, or subversive of public order or decency, but when conducted in given localities, it may be highly dangerous to the public safety. Of this fact the supervisors are made the judges, and having taken action in the premises, we do not find that they have prohibited the establishment of laundries, but that they have, as they might well do, regulated the places at which they should be established, the character of the buildings in which they are to be maintained, etc.

The process of washing is not prohibited by thus regulating the places at which, and the surroundings by which, it must be exercised.

The order No. 1569 and section 68 of order No. 1587 are not in contravention of common right, or unjust, unequal partial, or oppressive in such sense as authorizes us in this proceeding to pronounce them invalid.

[Omitting other points.]

We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the Constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703.

That this class of orders is not repugnant to our State Constitution need not now be discussed, as their validity with reference to

Osment v. McElrath.

that instrument has been sustained in *Ex parte Mount*, 66 Cal. 448, 575; *Ex parte Moynier*, 65 Cal. 33; *Ex parte Wolters*, 65 Cal. 269.

A regulation which applies alike to all persons engaged in a given pursuit, without distinction as to nationality, residence, age, sex, or condition, is not, when otherwise regular and valid, subject to the criticism of being in violation of treaty obligations existing between the United States and China.

We are of opinion the petitioner should be remanded to the custody of the sheriff.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the petitioner is remanded to the custody of the sheriff.

OSMENT V. McELRATH.

(68 Cal. 466.)

Partnership — of lawyers — winding up — statute of frauds.

On dissolution of a partnership between lawyers, each is entitled to share in the fees collected from the unfinished business.

An agreement by one to wind up the business and pay the other his share of the fees collected, is valid and is not within the statute of frauds, although it was not expected that the business could be wound up in a year.

ACTION for settlement of partnership accounts. The opinion states the case. The plaintiff had judgment below.

William H. Fifield, for appellant.

N. H. Clement, for respondent.

BELCHER, C. C. In July, 1869, the plaintiff and defendant entered into partnership as attorneys and counsellors at law, and took an office in the city of San Francisco. The partnership was continued until the 7th of November, 1874, and then dissolved by mutual consent. At the time of its dissolution all moneys on hand, and all other assets and property of the firm were equally divided between the partners. There were some fees due, but uncollected, for business which had been finished, and they had several cases in the courts, in some of which the fees were, and in others were not,

contingent upon their success. Shortly after the dissolution the plaintiff removed to the State of Tennessee, and there engaged in the practice of the law, while the defendant remained and continued to practice his profession in the city of San Francisco. During the next two years, the defendant attended to the unfinished business of the firm, and disposed of most of it. He won some of the cases in which the fees were contingent and lost others. He collected fees which were earned before and others which were earned after the dissolution.

From early in 1875 until 1881 a correspondence was kept up between the parties about the business of the late firm and the division of the money collected by the defendant therefor.

In July, 1881, the plaintiff returned to this State, and on the 6th of August commenced this action for a settlement of the partnership accounts.

It is alleged in the amended complaint, "that upon the dissolution of the firm, as aforesaid, the defendant voluntarily undertook to attend to all the business, and to conduct all the litigation then pending or necessary, which had been intrusted to said firm; to collect the fees and to wind up the old business of the firm, and to account to plaintiff for his share of said fees." That the business was substantially wound up, and according to the information and belief of the plaintiff, the defendant had received "the sum of about \$20,000, for fees due from the business of the old firm on hand at the time of its dissolution," and had refused to pay to plaintiff any part of the fees so collected.

The defendant demurred to the complaint, and his demurrer was overruled. He then answered, and among other things, denied that he had "received since the dissolution of said firm the sum of \$20,000 as fees or otherwise or any sum as fees or otherwise growing out of the old business of said firm in excess of \$10,000." He subsequently filed an amended answer, and in that denied that he had received "any sum as fees or otherwise growing out of the old business of said firm in excess of \$6,534.86," and he alleged that the action was barred by the provisions of section 339, subdivision 1, of the Code of Civil Procedure. The court below found that since the dissolution of the partnership the defendant had collected and received from the business of the firm, committed to his hands at the time of the dissolution, the gross sum of \$7,144.86; that he had paid out of that sum for necessary costs and expenses the sum of \$305; that the reasonable

Osement v. McElrath.

value of his services and labor in the conduct and management of the business so left in his hands was \$2,000, and that the plaintiff's action was not barred by the statute of limitations. After deducting from the gross amount received \$305, paid out for expenses, and \$2,000 for value of services, judgment was entered in favor of plaintiff for one-half of the remainder, but without costs.

The defendant appeals from the judgment, and from an order denying a new trial, and assigns numerous errors.

[Omitting minor points.]

There is nothing in the point that the defendant's undertaking to wind up the business and to pay to the plaintiff his share of the fees was without consideration, and therefore void; nor in the further point, that as the business was not expected to be all wound up within a year, the agreement was within the statute of frauds. The business was intrusted to the firm, and it was the duty of both parties to conduct it to an end. This duty they owed to the clients and to each other, and it continued after the dissolution as to all unfinished business. But as between themselves they might divide the labor and the fees as they pleased; and it cannot be said, as matter of law, that because the defendant gratuitously undertook to do and has done all the work in particular cases, the plaintiff is therefore not entitled to any share of the compensation received in such cases; nor can it be said after the work is done that the defendant is entitled to claim all the compensation, because when he undertook to do it, it was not expected to be completed within a year. Doubtless the defendant might have refused to go on and attend to the cases alone, but he did not do so, and now the objection cannot avail him.

It is insisted for the defendant that the plaintiff is not entitled to any share in the fees which were contingent and were earned after the dissolution, and if he is entitled to some share, still the amount allowed him, in view of the labor and expenses of the defendant, was far too large.

It is evident from the correspondence which was carried on between the parties during all the time the work was being done by the defendant, that it was understood by both of them that the plaintiff was to share in the fees, and the only difficulty which finally arose was as to what that share should be. Thus, in a letter written to the plaintiff in January, 1877, the defendant says: "I am desirous of settling up our old business. Since you left here in

November, 1874, I have collected various sums from the partnership business. In some instances the cases in which the collections were made had been terminated; in others some service had been rendered by us, and the payments were on account. In the first class of cases it is just to divide the amounts received by me since your departure. In the other class an equitable apportionment should be made."

The general rule is, that a partner is not entitled to any compensation for services rendered by him to the partnership (§ 2413, Civ. Code), and it applies after as well as before dissolution.

Collyer states the rule as follows: "As it is the duty of each partner to devote himself to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit of the partnership, it follows that he must do it without any reward or compensation, unless there is an express stipulation to that effect. And there is no difference in this respect, though the duties performed by the partners have been very unequal in value and amount."

"As the power of partners, with respect to rights created pending the partnership, remains after the dissolution, so also do their mutual obligation. It is therefore the duty of those who are appointed to wind up the affairs of the partnership to do everything for the utmost advantage of the concern. No partner can make any use of the property inconsistent with that purpose, nor in performance of this business, can he claim to himself any particular reward or compensation for his trouble." Coll. Partn. §§ 186, 199.

This is the rule of commercial partnerships, and as said by the Supreme Court of the United States, "there may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases however with which we are acquainted recognize any such distinction." *Denver v. Roane*, 99 U. S. 359.

We are not called upon to say whether the distinction referred to should have been made in this case, as it was made by the court below, when it allowed the defendant \$2,000 for his services, and the plaintiff acquiesces in the allowance.

We are satisfied that the plaintiff was entitled to share in the fees collected for the unfinished business, and in view of the con-

Osmont v. McElrath.

flicting testimony as to what the defendant's services were reasonably worth, we cannot say that the apportionment was not equitable and just.

On the whole, we can see no error in the record prejudicial to the appellant, and the judgment and order should be affirmed.

SEARLS, C., concurred; FOOTE, C., did not participate in this case.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Judgment affirmed.

Hearing in banc denied.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

RICE v. CITY OF EVANSVILLE.

(108 Ind. 7.)

Municipal corporation — sewer — negligence in plan.

A city is not liable for an injury to private property by the overflowing of a sewer, caused by its incapacity, resulting from a mere error of judgment not amounting to gross negligence.

ACTION of damages for injury by overflow of a sewer. The opinion states the case. The defendant had judgment below.

J. E. Williamson, for appellant.

J. B. Rucker, for appellee.

ELLIOTT, J. The appellant seeks a recovery against the city of Evansville for injuries to his property caused by overflows, which he charges resulted from the wrongful and the negligent acts of municipal authorities. The general verdict was for the appellee, and with it the jury returned answers to interrogatories submitted to them.

It is found by the jury, in answer to special interrogatories, that there was no negligence in devising the plan of the sewers or in constructing them, and as it is to these sewers that the appellant

Rice v. City of Evansville.

attributes his injury, he cannot recover solely upon the ground that the sewers were of insufficient capacity. A municipal corporation is responsible for negligence in devising the plan of a sewer, as well as for negligence in carrying the plan into execution, but it is not responsible for mere errors of judgment. If the inadequacy in the size of a sewer is owing to the omission to exercise ordinary skill and care in planning and performing the work, the municipal corporation is liable, but if the inadequacy of the sewer is attributable to a mere error of judgment, there is no liability. *City of North Vernon v. Voegler*, 103 Ind. 314; *City of Crawfordsville, v. Bond*, 96 Ind. 236; *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Cummins v. City of Seymour*, 79 Ind. 491; s. c., 41 Am. Rep. 618; *Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135; *City of Indianapolis v. Huffer*, 30 Ind. 235.

The controlling question in cases where the municipal corporation is sought to be made liable for injuries from overflows is: Was there negligence on the part of the municipal corporation in devising the plan of the sewer or in carrying it into execution? For if there was no negligence there is no liability, although an error of judgment may have caused the corporate authorities to provide a plan for a sewer of inadequate capacity. There may possibly be cases where the court could say, as a matter of law, that the inadequacy of the sewer was such as in itself to constitute negligence, but however this may be, it is very clear that with the general verdict and the special answer of the jury against the appellant, the court cannot declare that the city was guilty of negligence in this instance.

It is contended that the facts found by the jury show that the city wrongfully obstructed a natural water-course by constructing a culvert of insufficient size, and that where a natural water-course is obstructed the corporation is liable for resulting injuries, although it may not have been guilty of negligence. Upon the strength of this argument the appellant claims that he is entitled to a judgment on the special finding, but we cannot uphold this claim, for if it were granted that there was a natural water-course, and that a culvert was constructed of insufficient size, still there can be no recovery, because all the facts essential to a recovery are not found, and because the answers are not absolutely irreconcilable with the general verdict. It is found that there was no negligence, and that the culvert is of less capacity than the water-course was, but how

much less is not found. The record thus exhibits the finding: Question: "How much less capacity has the sewer than the water-course?" Answer: "Don't know; there was no evidence on that point." In the face of the general verdict, and in view of the fact that the burden of proof was on the appellant, it cannot be asserted that his case is made out, for it may well be that the capacity of the sewer was so little different from that of the natural water-course as not to perceptibly obstruct the flow of water. As against the general verdict, it cannot be presumed that there was a material obstruction of the water-course. Nor does it appear from the answers that the culvert caused the overflows; for any thing that appears, the overflows may have occurred more often before than after the construction of the culvert. Nor does it appear that the incapacity of the culvert was the proximate cause of the overflow of appellant's property, and it is well settled that it must appear that the wrong of the defendant was the proximate cause of the injury which is alleged as the cause of action. *Cincinnati, etc., R. Co. v. Hiltzhauer*, 99 Ind. 486.

[Minor matter omitted.]

It has long been the law of this State, that for consequential injuries resulting from the grading of streets in a careful and skillful manner, the municipal corporation is not liable. *Macy v. City of Indianapolis*, 17 Ind. 267; *Weis v. City of Madison, supra*; *City of Kokomo v. Mahan*, 100 Ind. 242, and cases cited, p. 244.

So far then as any injury resulted from the grading of the streets, no claim can be successfully urged against the city, although it may have greatly increased the flow of surface water along the property of the appellant.

While it is the law that a city is not responsible for consequential injuries resulting from the careful and skillful grading of its streets, still it is liable if it undertakes to collect the water in one channel, and is negligent in devising the plan, performing the work, or providing an outlet where one is made necessary by its own act. A municipal corporation is not however bound to undertake the work of providing sewerage or drainage, but if it does enter upon the work, it is liable for negligence in devising the plan and in doing the work. *Weis v. City of Madison, supra*, and cases cited; *City of Logansport v. Wright*, 25 Ind. 512.

In this case there is evidence supporting the appellant's theory that there was negligence in devising the plan of the sewer as well

Rice v. City of Evansville.

as in doing the work, but there is also evidence to the contrary, and we must accept that as credible on which the jury acted. *Binford v. Adams*, 104 Ind. 41; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Gathright v. Burke*, 101 Ind. 590; *Julian v. Western Union Tel. Co.*, 98 Ind. 327; *Cain v. Goda*, 94 Ind. 555; *Arnold v. Will*, 86 Ind. 367.

Accepting as trustworthy the evidence which influenced the jury, we must hold that there was no negligence.

We cannot agree with counsel that the evidence shows without conflict that the city wrongfully collected the water in one channel and poured it upon the appellant's property, for on this point there is a material conflict. We agree with counsel as to the legal proposition that a city is liable if it undertakes to collect in one channel, and wrongfully pours it upon another's land. *Lipes v. Hand*, 104 Ind. 503; *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Weis v. City of Madison, supra*; *Cairo, etc., Co. v. Stephens*, 73 Ind. 278, 283; s. c., 38 Am. Rep. 139; *Templeton v. Voshloe*, 72 Ind. 134; s. c., 37 Am. Rep. 150, and cases cited.

While we agree with counsel as to the legal proposition, we think the case is not within the rule, for the reason that the evidence fairly shows that the city attempted to convey the water past the property of the appellant, but was not guilty of negligence, although the officers of the city may have erred in judgment as to the size of the sewer or culvert. In this state of the evidence we must respect the verdict of the jury upon this point.

We cannot concur in counsel's view that the evidence shows without conflict that the city undertook to build a culvert across a natural water-course. We need not decide whether there is, or is not, an absolute liability irrespective of the question of negligence, in cases where a municipal corporation undertakes to build a sewer, and it is therefore unnecessary for us to comment upon the cases of *Perry v. City of Worcester*, 6 Gray, 554; s. c., 66 Am. Dec. 431; *Earl v. De Hart*, 1 Beasley, 280; s. c., 72 Am. Dec. 395; *Palmer v. Waddell*, 22 Kans. 352, and other like cases referred to by the appellant. There is some evidence tending to prove that there was a natural water-course, but there is evidence to the contrary, and we cannot attempt to reconcile the conflict.

Ravines through which surface water occasionally flows are not natural water-courses within the meaning of the law. "To constitute a natural water-course, there must be a bed and banks and evi-

Watson v. Penn.

dences of a permanent stream of running water." *Weis v. City of Madison, supra*; *Hoyt v. City of Hudson*, 27 Wis. 656; s. c., 9 Am. Rep. 473; *Howard v. Ingersoll*, 13 How. 381, 427.

We do not think the evidence in this case so clearly shows that there was a natural water-course as to make it our duty to reverse on the evidence.

Judgment affirmed.

WATSON V. PENN.

(106 Ind. 21.)

Will — life-estate in leased land — death of life-tenant during term — title to rents.

A devisee for life of land subject to a lease made by the testator, dying during the term, before any rent accrues, the rent goes to the reversioner, and is not carried by a bequest of all the testator's personalty, including notes and accounts.

ACTION against an executor for rent collected. The opinion states the case. The plaintiff had judgment below.

T. H. Ristine and H. H. Ristine, for appellant.

A. D. Thomas, for appellee.

MITCHELL, J. John F. Penn, as guardian of Margaret Penn, brought this suit to recover from William W. Watson certain rent money collected by the latter as executor of the last will of James G. Watson, deceased, which the guardian claimed on behalf of his ward.

The questions involved arise on the pleadings, which present the following facts: James G. Watson died on the 17th day of September, 1882, testate. Prior to his death the testator leased 160 acres of land, owned by him, to one Hunt for the term of one year, to commence March 1, 1883, the rental agreed upon being \$275. It does not appear that the time for the payment of rent was agreed upon, or that there was such a usage in that respect as would make it fall due otherwise than as the law would imply.

By his will the testator devised the land leased to his widow, Ann E. Watson, for her life, with remainder over to his granddaughter, Margaret Penn, the appellee's ward.

Watson v. Penn.

Another clause of the will gave the widow, Ann E. Watson, all the personal property, including all notes and accounts owned by and owing to the testator at the time of his death.

Ann E. Watson, the testator's widow, died intestate, June 19, 1883, without having received any part of the rent in question. The appellant, as executor of the last will of James G. Watson, received the rent, and refused to pay it over to the guardian of Margaret Penn, claiming that under the will it properly belonged to the estate of Ann E. Watson, deceased.

Upon the facts stated, the court below was of the opinion that the appellee was entitled to recover the whole amount received by the appellant for rent. Judgment was given accordingly. The only inquiry here is as to the propriety of this holding.

Mrs. Watson having taken her life-estate subject to an existing lease, which was made in the life-time of the testator, and having died during the term of the lessee, before any rent became due, the first question is, was any or all of the rent for the term payable to her personal representative?

It is a settled rule of law, which the appellant does not question, that rents of real estate, which have accrued and become payable before the death of an intestate, go to the personal representative, while those which mature and fall due afterward go to the heir. *King v. Anderson*, 20 Ind. 385; *Evans v. Hardy*, 76 Ind. 527; *McDowell v. Hendrix*, 67 Ind. 513; *Dorsett v. Gray*, 98 Ind. 273. Rents that have accrued are rents which are due.

By the common law, the right to receive accruing rent, which would have been payable to a life-tenant, who took his estate subject to a prior lease for a term, passes to the reversioner in case of the death of such tenant before rent day. In such a case, wherever the reversion goes, whether to the original lessor, or his grantees or descendants, the accruing rent, from the rent day next antecedent to the death of the life-tenant, follows without apportionment. If the estate of the life-tenant terminates intermediate rent days, or before any rent has become due, the accruing rent becomes an incident of, and is annexed to the estate of the reversioner. Whoever owns the reversion when the rent falls due is entitled to receive the whole sum, unless it is otherwise provided by contract. *Tayl. Landl. & Ten.*, §§ 154-156; *Marshall v. Moseley*, 21 N. Y. 280; *Perry v. Aldrich*, 13 N. H. 343; s. c., 38 Am. Dec. 493; *Wilcoxon v. Donnelly*, 90 N. C. 245; *Porter v. Sweeney*,

61 Tex. 213; *Stevenson v. Hancock*, 72 Mo. 612; *Westmoreland v. Foster*, 60 Ala. 448.

An exception to this rule occurs when the lessor receives a note, or other obligation, independent of the lease, to secure the payment of rent. Some of the authorities hold that by this means the obligation to pay rent is separated from the estate, and does not follow the reversion.

Rent in arrears is no part of the reversion. In any case such rents are recoverable by the personal representative of the life-tenant. But rent is not in arrears and does not become a debt until the day when by the terms of the lease it becomes payable. *Wood v. Partridge*, 11 Mass. 488; *Rundall v. Rich*, 11 Mass. 494; *Wood Landl. and Ten.*, § 452.

If there be no time stipulated for the payment of rent, or no such usage as that an agreement to the contrary may be implied, payment is to be made at the end of the year, rent being in its nature a return for the enjoyment of the annual profits of the land. *Elmer v. Sand Creek Tp.*, 38 Ind. 56; *Wood v. Partridge, supra*; *Tayl. Landl. and Ten.*, § 391.

It may be remarked, that at the common law, in case a life-tenant, who had no power to make a lease to continue beyond the period of his life, leased the estate and died between rent days, the under tenant or lessee escaped the payment of rent entirely from the last rent day. The lessee was not bound to pay the personal representative of his lessor because he suffered a technical eviction on account of the termination of his lessor's estate before the end of the term, or before the rent fell due. The reversioner could not recover, because the estate was not devolved upon him until the termination of the lease, and he was not in privity either of estate or by contract with the lessor. The death of the life-tenant terminated the lease, as well as the estate of the lessor. If the lessee continued in possession, he became thenceforth liable to the reversioner under a new contract, but he was absolved from the payment of all rent which had not matured when the estate of his original lessor was determined.

The statute of 11 George II, chap. 19, § 15, after reciting the defects in the law, provided, among other things, that in case the death of a life-tenant, who had leased the estate, happened before the day fixed for the payment of rent, his executor or administrator might recover a proportion of the rent according to the time the

Watson v. Penn.

lessor lived during the last rent period. Substantially to the same effect is § 5223, R. S. 1881.

This statute has however manifestly no application to the case before us. It provides, in substance, that when a tenant for life, who shall have demised any lands, shall die before the day when any rent becomes due, his executor or administrator may recover from the under tenant the rent which accrued before the life-tenant's death.

As we have already seen, the lease or demise under which the rent in controversy accrued was not made by the life-tenant. She took her estate subject to the existing lease. The will which created her life-estate gave the reversion to the appellee's ward, and as the reversion came from the lessor, under whose lease the rent in controversy accrued, it came with the right annexed to collect all accruing rent, as an incident to the estate.

As there was no necessity for a statute in cases where the accruing rent followed the reversion, the common-law rule prevails.

It is said however because the testator's will provided that his widow should take all his personal property, including all notes and accounts which might be owing him at his death, that by force of this bequest the accruing rents were carried out of the rules above referred to, and thus became the property of the widow.

As it does not appear either from any alleged usage or from the terms of the agreement, that any part of the rent had matured or become payable at the death of the testator, or even at the death of the widow, it is not perceived how the position contended for can be maintained.

The testator died after the lease was made, but before the term commenced. It is impossible therefore in any view of the case to consider the rent which subsequently accrued as an account owing to the testator at the date of his death, so as to be controlled by the will. Accruing rents are however not affected by or included in the general term "accounts." While the term "account" has no very clearly defined legal meaning, the primary idea conveyed by it is some matter of debt, or a demand in the nature of a debt, arising out of contract. *Nelson v. Board, etc.*, 105 Ind. 287.

Rents accruing from, and issuing out of real estate, are in the nature of chattels real, and cannot be assimilated to, or accurately described as accounts, until they have accrued or become due

State v. Webber.

Until then they are annexed to the real estate and an incident of the reversion. Bouvier Dict., title "Rent."

The judgment is affirmed, with costs.

Judgment affirmed.

STATE V. WEBBER.

(106 Ind. 81.)

Schools — practicing music — reasonableness of the rule.

A rule that pupils in a public high school shall employ a certain period in the study and practice of music, and provide themselves with certain books therefor, is valid, and an expulsion for unexcused disobedience thereof will be sustained.*

MANDAMUS to compel reinstatement of a pupil in a public school. The opinion states the case. The defendant had judgment below.

J. H. Bradley and L. A. Cole, for appellant.

A. Anderson and M. Nye, for appellees.

Howk, C. J. [Omitting detailed statement of complaint.] An alternative writ of mandate was issued by the court. The appellees appeared and jointly demurred to the relator's verified complaint or affidavit herein, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court. The relator excepted, and failing to amend, judgment was rendered against him for appellees' costs.

The sustaining of the demurrer to his verified complaint is assigned here, as error, by appellant's relator.

We have given a full summary of the facts stated by the relator, in his verified complaint herein almost in the language of the pleader. It will be seen therefrom that the superintendent of the free public schools of the city of Laporte, with the sanction of the trustees of the school city of Laporte, had made a rule or regulation for the government of the pupils of the high school, in the graded schools of such city, requiring that each of such pupils

* See *Destins v. Goss* (85 Mo. 485), 55 Am. Rep. 387.

State v. Webber.

should, at stated intervals, employ a certain period of time in the study and practice of music, and should provide himself with a prescribed book for that purpose. The relator's son, Abram Andrew, was one of the pupils of such high school, and at the instigation, and by the direction, of his father, he disobeyed or violated such rule and regulation, and refused to employ any period of time in the study and practice of music, and to provide himself with the prescribed book or books for the purpose of the study and practice of music. For his disobedience of such rule or regulation, and his refusal to comply therewith, the pupil, Abram Andrew, was promptly suspended from the high school, and his suspension was approved by the trustees of the school city of Laporte. This action was brought by the father and natural guardian of the suspended pupil to compel, by mandate, the governing authorities of the school corporation to revoke such suspension, and to readmit such pupil, to the high school.

The question for our decision in this case, as it seems to us, may be thus stated: Is the rule or regulation, for the government of the pupils of the high school of the school city of Laporte, in relation to the study and practice of music, a valid and reasonable exercise of the discretionary power conferred by law upon the governing authorities of such school corporation?

In section 4497, Rev. Stat., 1881, in force since August 16, 1869, it is provided as follows: "The common schools of the State shall be taught in the English language; and the trustee shall provide to have taught in them orthography, reading, writing, arithmetic, geography, English grammar, physiology, history of the United States, and good behavior, and such other branches of learning and other languages as the advancement of pupils may require and the trustees from time to time direct."

Under this statutory provision, and others of similar purport and effect, to be found in our school laws, it was competent, we think, for the trustees of the school city of Laporte to enact necessary and reasonable rules for the government of the pupils of its high school, directing what branches of learning such pupils should pursue; and regulating the time to be given to any particular study, and prescribing what book or books should be used therein. Such trustees were and are required, by the express provisions of section 4444, Rev. Stat., 1881, in force since March 6, 1865, to "take charge of the educational affairs" of such city of Laporte; "they

may also establish graded schools, or such modifications of them as may be practicable; and provide for admitting into the higher departments of the graded school, from the primary schools of their townships, such pupils as are sufficiently advanced for such admission."

The power to establish graded schools carries with it of course the power to establish and enforce such reasonable rules as may seem necessary to the trustees, in their discretion, for the government and discipline of such schools, and prescribing the course of instruction therein. Confining our opinion strictly to the case in hand, we will consider and decide these two questions, in the order of their statement, namely:

1. Has the appellant's relator shown, by the averments of his verified complaint, that the rule or regulation for the government of the pupils of the high school, in the school city of Laporte, of which he complains, was or is an unreasonable exercise of the discretionary power conferred by law upon the trustees of such school corporation and the superintendent of its schools?

2. Conceding or assuming such rule or regulation to be reasonable and valid, has the relator shown, in his complaint herein, any sufficient or satisfactory excuse for the non-compliance therewith, and the disobedience thereof, by his son Abram Andrew, a pupil of such high school, or any sufficient or legal ground for the revocation of the suspension of his son, or for his son's readmission as a pupil in such high school?

1. As to the first of these questions, it will be seen from the relator's verified complaint, the substance of which we have heretofore given, that he has not attempted to show, in any manner, that the rule or regulation requiring that each of the pupils of the high school, as one of the exercises prescribed by the superintendent, with the sanction of the trustees, for the pupils of such school, should at stated intervals employ a certain period of time in the study and practice of music, and for that purpose should provide himself with a prescribed book, was not a reasonable and valid exercise of the discretionary power conferred by law upon such trustees and superintendent. It cannot be doubted, we think, that the legislature has given the trustees of the public school corporations the discretionary power to direct, from time to time, what branches of learning, in addition to those specified in the statute, shall be taught in the public schools of their respective

corporations. Where such trustees may have established a system of graded schools, or such modifications of them as may be practicable, within their respective corporations, they are clothed by law with the discretionary power to prescribe the course of instruction, in the different grades of their public schools. We are of opinion that the rule or regulation of which the relator complains in the case under consideration was within the discretionary power conferred by law upon the governing authorities of the school city of Laporte, that it was not an unreasonable rule, but that it was such a one as each pupil of the high school, in the absence of sufficient excuse, might lawfully be required to obey and comply with.

It will be observed that the relator has stated the requirements of the rule, whereof he complains, with much vagueness and uncertainty. "Each of the pupils shall, at stated intervals," etc. What the intervals are, whether once a week, once a month, or once each term or session, is wholly left to conjecture. "Employ a certain period of time," etc. There is no period of time more uncertain in duration, than the time represented by the expression, "a certain period of time." Was it fifteen minutes, one hour, or one day? The relator has not informed us.

We pass to the consideration of the second question, above stated.

2. The school authorities of the city of Laporte, in the exercise of the discretionary power conferred on them by law, adopted a rule or regulation requiring that each pupil of their high school should, at stated intervals, employ a certain period of time in the study and practice of music, and for that purpose should provide himself with a prescribed book. The relator requested the superintendent of the public schools of the city of Laporte to excuse his son, Abram Andrew, who was one of the pupils of the high school, from the study and practice of music at the musical exercise of such school, and directed his son not to participate in such musical exercises. The superintendent afterward required the relator's son, as one of the pupils of the high school, to take part in the musical exercise of the school, and upon his refusal to obey or comply with such requirement, suspended him from such high school. The only cause or reason assigned by the relator for requiring his son to disobey such rule or regulation was that he did not believe it was for the best interests of his son to participate in the musical studies and exercises of the high school, and did not wish him to do so.

The relator has assigned no cause or reason, and it may be fairly assumed that he had none, in support either of his belief or of his wish. The important question arises, which would govern the public high school of the city of Laporte, as to the branches of learning to be taught and the course of instruction therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator, without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question; the arbitrary wishes of the relator, in the premises, must yield and be subordinated to the governing authorities of the school city of Laporte, and their reasonable rules and regulations for the government of the pupils of its high school. This is the doctrine of the case decided by the courts of last resort in many of our sister States; and as applicable to the facts of this case, we think it is the better doctrine. *Roberts v. Boston*, 5 Cush. 198; *Hodgkins v. Rockport*, 105 Mass. 475; *Ferriter v. Tyler*, 48 Vt. 444; s. c., 21 Am. Rep. 133; *Sewell v. Board, etc.*, 29 Ohio St. 89; *Donahoe v. Richards*, 38 Me. 379; s. c., 61 Am. Dec. 256; *Gurnsey v. Pitkin*, 32 Vt. 224; *Kidder v. Chellis*, 59 N. H. 473.

On the other hand, it is not to be denied that the decisions of the Supreme Court of Illinois and Wisconsin are in apparent conflict, to some extent at least, with what we here decide. *Morrow v. Wood*, 35 Wis. 59; s. c., 17 Am. Rep. 471; *Rulison v. Post*, 79 Ill. 567; *Trustees, etc., v. People*, 87 Ill. 303; s. c., 29 Am. Rep. 55. There is much in the opinions of those learned courts, which applied to the cases before them, meets our approval; but we think that the doctrine of those cases cannot apply, and ought not to be applied, to the case in hand as stated by the relator, in his verified complaint herein, to which case we limit this opinion.

For the reasons given, our conclusion is that no error was committed by the court below in sustaining appellees' demurrer to the relator's complaint.

The judgment is affirmed, with costs.

Judgment affirmed.

Spencer v. Sloan.

SPENCER V. SLOAN.

(108 Ind. 122.)

Negotiable instrument — indorsement after payment — evidence — consideration.

an action by the holder against the payee, indorser of a promissory note, the latter may show that he indorsed it after payment at the plaintiff's request, as evidence of payment.

A prior existing debt is a valid consideration for the pledge of negotiable paper as security for its payment.

ACTION on a promissory note. The head-note states the case. The defendant had judgment below.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

W. W. Herod, for appellee.

NIBLACK, J. This was an action by Benjamin F. Spencer, as the holder, against William Sloan, as indorser, of a promissory note executed by one Milton Spencer to the said Sloan on the 10th day of July, 1868, for \$405, and payable two days after date.

The complaint alleged the insolvency of Milton Spencer at the time of, and ever since the assignment of the note.

The defendant answered in seven paragraphs, but he afterward withdrew the first and second paragraphs, and a demurrer having been sustained to the fourth paragraph, only the third, fifth, sixth and seventh paragraphs remain in the record.

To these third, fifth, sixth and seventh paragraphs of answer demurrers were filed at the proper time and afterward overruled.

The third paragraph averred that at the time the note in suit was executed Milton Spencer, the maker thereof, and the plaintiff were partners in business; that the defendant loaned such partners the sum of \$405, and as evidence of the debt thereby created, took the note in question under the belief that it was signed by both of said partners; that a certain railroad bond of the real and face value of \$1,200 was at the same time delivered to him, the defendant, as collateral security for the payment of said note; that after the maturity of said note, and by the direction of the plaintiff and the said Milton Spencer, he surrendered the same to one Thomas A. Goodwin, who paid him the full amount due upon such note;

that at the request of the said Goodwin, he, the defendant, indorsed his name upon the note as evidence that it had been paid, and for no other purpose; that for the reasons given he never sold or transferred the note to any other person.

The fifth paragraph alleged that prior to the execution of the note sued on, the plaintiff, to induce the defendant to loan to the said Milton Spencer the sum of \$405, agreed to put up a certain railroad bond of the value of \$1,000 as collateral security therefor; that the said loan was accordingly made and the note described in the complaint executed; that said bond was thereupon delivered to the defendant as such collateral security; that when in October, 1868, the defendant transferred the note to the plaintiff, he also transferred to him the bond, which was amply sufficient to pay the note, but that the latter had either sold or lost said bond, and converted the same to his own use without taking any steps whatever to subject such bond to the payment of the note; that at the time said note was transferred to the plaintiff, the said Milton Spencer was hopelessly and notoriously insolvent, as the plaintiff well knew, and has ever since so continued to be.

The sixth paragraph asserted that the note herein described was given by Milton Spencer, the maker, in consideration of a loan of \$405; that at the time of the execution of the note, he, the said Milton Spencer, placed in the hands of the defendant a certain railroad bond of the value of \$1,000 to secure the payment of said note; that the defendant accepted and held said bond as such security until in October, 1868, when he transferred said bond and note to the plaintiff; that the plaintiff thereafter sold or destroyed said bond without making any effort to subject the same to the payment of said note, whereby said bond as a security for such payment has become lost; that the said Milton Spencer was at the time of such transfer wholly insolvent as the plaintiff well knew.

The seventh paragraph stated that the plaintiff is a brother of the said Milton Spencer, the maker of the note declared on, and that to secure the payment of the said note he delivered to, and placed in the hands of the defendant a certain railroad bond of the face and actual value of \$1,000; that afterward, to redeem said bond, the plaintiff paid off and discharged said note; that thereupon the defendant surrendered to him said note and bond; that after the note and bond had been so surrendered to him, the plaintiff asked the defendant to put his name on the back of the note to

Spencer v. Sloan.

show that it had been paid by him and not Milton Spencer, and that for that purpose, and for no other, the defendant did put his name on the back of the note; that consequently the defendant did not sell, assign or transfer the note to the plaintiff.

The plaintiff replied in five paragraphs, but afterward withdrew all but the fifth paragraph. This latter paragraph was addressed only to the fifth and sixth paragraphs of the answer, and averred that the note indorsed by the defendant, as charged in the complaint, was executed as evidence of a prior indebtedness of Milton Spencer, the maker of such note to the defendant, and payable long before the time of the execution of such note, and for no other consideration whatever; that the bond referred to in said fifth and sixth paragraphs of the answer was always the property of the plaintiff, and hence never belonged to the said Milton Spencer, either in whole or in part, all of which was fully known to the defendant at the time said bond came into his possession and at the time he assigned the note to the plaintiff; that the loan of money to Milton Spencer was not made, nor was the note executed on the faith of such bond; that such bond was not delivered to the defendant until long after the execution of the note, and then only as collateral security for the prior existing debt, evidenced by the note. Wherefore the plaintiff averred that there was no consideration to support the pledge of said bond to the defendant as collateral security for the payment of said note; that the surrender of said bond by the defendant to the plaintiff constituted a relinquishment of all the former's alleged right to have the same held as collateral security for the indebtedness represented by said note.

A demurrer was sustained at special term to this paragraph of reply, and the plaintiff declining to plead further, final judgment was rendered against him for want of a reply, and that judgment was affirmed at General Term.

On behalf of the plaintiff below, it is claimed that the indorsement of a promissory note constitutes a certain and well defined contract, with as much force and meaning as if all the conditions and stipulations had been written out at full length, and that hence parol evidence is inadmissible to either modify or contradict such a contract of indorsement, and the case of *Stack v. Beach*, 74 Ind. 571; s. c., 39 Am. Rep. 113, is relied upon as supporting that doctrine. But the doctrine as thus stated was in that case only made to apply to indorsements upon a note or bill, which regularly follow

that of the payee, and as to that class of indorsements many exceptions to the general rule announced were recognized. So far as we are advised, so strict a rule has never been applied to indorsements upon a note or bill by the payee.

It is true that where the law attaches a definite meaning to an indorsement upon a note or bill, parol evidence will not be admitted to qualify or contradict the contract of indorsement, but this rule for the exclusion of parol evidence does not extend to evidence offered to attack the validity of the contract itself for want of consideration, or on account of fraud, or because the consideration has failed; so the fact that it would be inequitable or fraudulent to enforce the contract of indorsement, as that the indorser was an agent, or that the note was indorsed for a special purpose, such as the creation of a trust, or for collection, or for the accommodation of the indorsee, may be proved by parol. *Edwards Bills and Notes*, §§ 393, 399, 400, 442; 3 Kent Com. 80.

In the case of *Smythe v. Scott*, 106 Ind. 245, it was said that "Where an indorsement is made by the payee without consideration, or upon some trust arising out of an antecedent transaction, or to accomplish some special purpose, the facts which go to show the transaction may be shown. This, for the purpose of showing the equities between the parties, and to determine the consideration upon which the indorsement was made."

From what has been said, the inference would seem to be plain that the defendant was entitled to show that when he put his name on the back of the note, it had already been paid, and that his name had been so put on the note at the request of the plaintiff as evidence of such payment. It follows that there was no error in overruling the demurrers to the third and seventh paragraphs of the answer. *Dan. Neg. Inst.*, §§ 710, 711.

In support of the sufficiency of the fifth paragraph of the reply, it is further claimed that the pre-existing debt of Milton Spencer did not afford a sufficient consideration for the delivery of the railroad bond to the defendant as collateral security for payment of the note; that for that reason the defendant had no lawful right to retain the bond, and therefore, when he surrendered it to the plaintiff, it was simply a return of the bond to its lawful owner without any incumbrance upon it.

Whether a previous debt is sufficient to constitute a holding for value of collateral paper is a question upon which there has been a

Spencer v. Sloan.

very sharp conflict of authority in this country ever since the case of *Bay v. Coddington*, 5 Johns. Ch. 54; s. c., 9 Am. Dec. 268, was decided by Chancellor Kent. That case, in effect, declared that a previously existing debt did not constitute a sufficient consideration, for such a holding of collateral paper, and the doctrine of that case has obtained full recognition in a large number of the States. But the Supreme Court of the United States has uniformly held a contrary doctrine. In the case of *Swift v. Tyson*, 16 Peters, 1, this latter court declined to follow the case of *Bay v. Coddington*, *supra*, and has ever since continued to dissent from the rule recognized in that case. See *Jones Pledges*, § 107 *et seq.*; also *Bank of the Metropolis v. New England Bank*, 1 How. 234; *Goodman v. Simonds*, 20 How. 343; *McCarty v. Roots*, 21 How. 432; *Oates v. Nat'l Bank*, 100 U. S. 239; *Railroad Co. v. Nat'l Bank*, 102 U. S. 14.

It may therefore be now regarded as an established legal proposition in the Supreme Court of the United States, that an existing debt affords a sufficient consideration for the pledge of collaterals as security for its payment, and that seems to be in accord with the English decisions on the same subject. See again *Jones Pledges*, § 111, and authorities cited.

This court in the case of *Straughan v. Fairchild*, 80 Ind. 598, accepted the rule of construction thus established by the Supreme Court of the United States as the correct rule under the laws of this State, and still adhering to that rule as being more in the interest of commerce and of fair dealing than the contrary doctrine, we are brought to the conclusion that the court below at Special Term did not err in sustaining a demurrer to the fifth paragraph of the reply.

The judgment at General Term is affirmed, with costs.

Judgment affirmed.

NEW V. WALKER.

(108 Ind. 356.)

Patents — State regulation of sale — notes.

A State statute requiring the vendor of a patent right to file with the county clerk copies of the letters-patent, and to make an affidavit that the letters are genuine and unrevoked, and that he has authority to sell, and that the words "given for a patent right" shall be inserted in any obligation taken therefor, is valid as to promissory notes, and a promissory note taken by the vendor of a patent right who has not complied with the statute, which does not contain those words, is inoperative as between the parties, and as to a purchaser with notice, unless he shows that his indorser was a good purchaser in good faith.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

From the Hamilton Circuit Court.

B. F. Davis, J. Brownfield, T. J. Kane and T. P. Davis, for appellant.

R. R. Stephenson and W. R. Fertig, for appellee.

ELLIOTT, C. J. The complaint of the appellant is based on a promissory note written in the usual form, payable in a bank of this State, and payable to bearer.

The answer alleges that the note was executed in consideration of the sale and transfer to the appellee of the right to use, and sell for use, in a designated part of the State, an agricultural boiler and steam feeder, for which Puntan, to whom the note was executed, had obtained letters-patent; that the sale and transfer of the patent took place in Hamilton county in this State, on the 10th day of June, 1884; that Puntan had not then filed with the clerk of the court of that county a copy of his letters-patent, nor had he filed an affidavit that the letters were genuine and had not been revoked, and that he had authority to barter or sell the right to use the patented article; nor was there any clause in the note stating that it was "given for a patent right." It is also averred that the appellant knew that the note was given in payment for a patent right before she purchased it.

We have had occasion to consider the validity of our statute imposing certain duties upon the vendors of patent rights, and have expressly decided that in so far as it requires an affidavit from the vendor of his authority and charges him with the duty of filing a copy of the letters-patent, it is not in conflict with the Federal Constitution. *Brechbill v. Randall*, 102 Ind. 528; s. c., 52 Am. Rep. 695.

The reasoning of other cases decided by this court carries the doctrine somewhat further, and they lay down a principle that would, if carried to its logical conclusion, sustain the entire statute. *Fry v. State*, 63 Ind. 552; *Toledo Agr'l Works v. Work*, 70 Ind. 253; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *Hockett v. State*, 105 Ind. 250; s. c., 55 Am. Rep. 201.

We accept as correct the conclusion to which the reasoning of these cases leads, and affirm that our entire statute is valid, and that it neither usurps any powers of the Federal government nor encroaches upon the National Constitution nor violates any law of Congress. This conclusion is fully supported by the decision of the Supreme Court of the United States in *Potterson v. Kentucky*, 97 U. S. 501, and by other decided cases. *Tbd v. Wick*, 36 Ohio St. 370; *Haskell v. Jones*, 86 Penn. St. 173.

There are, as we know, cases which assert a different doctrine, but they are all based on the decision in *Ex parte Robinson*, 2 Biss. 309, and as that decision has been overthrown, the cases based upon it must fall. *Toledo Agr'l Works v. Work*, *supra*; *Fry v. State*, *supra*; *Brechbill v. Randall*, *supra*.

In imposing upon vendors of patent rights the duty of filing affidavits and copies of letters-patent, no powers vested in the Federal government are usurped, nor are the provisions of the National Constitution trenched upon, for nothing more is done than to prescribe a system of procedure for the protection of our citizens against imposition and fraud. No more is done by that part of the statute which requires affidavits and copies of letters patent to be filed, than to establish regulations for the government of the sale and transfer of a peculiar species of intangible property, which in its very nature is so essentially different from other property that it must necessarily be transferred in a different manner. The regulations established by our legislature are in the nature of police regulations, their purpose being to protect our people from being imposed upon by men who have either no authority to sell patent rights or no patent rights to sell. It has been directly decided by

the Supreme Court of the United States, as well as by this court, that the National Congress cannot make police regulations for the protection of the people of the States. *United States v. Dewitt*, 9 Wall. 41; *United States v. Reese*, 92 U. S. 214; *West. Un. Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692; *Brechbill v. Randall*, *supra*; *Hockett v. State*, *supra*.

As the Federal legislature cannot enact police regulations which will yield the citizen of the State just protection, it must be that the State legislature may enact such regulations, or the citizens be left without protection. We are unwilling to declare that vendors of patent rights cannot be restrained by reasonable police regulations, and we do therefore declare that the provisions of the statute under immediate mention, being in the nature of police regulations, are constitutional and valid.

The provision requiring the insertion of the clause, "given for a patent right," in promissory notes, we think, is also in the nature of a police regulation; but independent of this consideration, we regard that provision of the statute as valid, because it simply prescribes what shall be written in a promissory note given for a particular class of property. For more than half a century we have had statutes governing promissory notes, and making peculiar regulations concerning them, and during all those years their validity has remained unchallenged. To us it seems quite clear that such statutes are valid, and that the statute under discussion belongs to that class. This view of the subject finds strong support in the well reasoned case of *Tod v. Wick*, *supra*, where it was said: "The right to regulate the form and prescribe the effect of paper taken in commercial transactions has always been regarded as belonging to the States." In this view of the subject we concur, and our ultimate conclusion on this branch of the case is that the statute is valid in all its parts.

Where the assumed owner of personal property undertakes to transfer it in a method forbidden by statute, he can take no benefit from his illegal act. A patent right is property, and the States may regulate the method of its transfer, as they may any other property which is brought within its jurisdiction, provided, of course, no essential right in the property is taken away, and there is no encroachment upon the powers of the Federal Government. *Tod v. Wick*, *supra*; *Ames Iron Works v. Warren*, 76 Ind. 512; s. c., 40 Am. Rep. 258.

It is inconceivable that the vendor of personal property, whether it be intangible property like a patent right or not, can acquire any rights from acts performed in direct violation of law, since enforceable legal rights only spring from transactions which violate no principle of law or equity. A legal right cannot arise out of a wrong, so as to benefit the wrong-doer.

In our opinion a promissory note, executed in direct violation of a mandatory statute, is inoperative as between the parties and those who buy with notice. Where a statute, in imperative terms, forbids the performance of an act, no rights can be acquired by persons who violate the statute, nor by those who know that the act on which they ground their claim was done in violation of law. A promissory note, executed in a transaction forbidden by statute, is at least illegal as between the parties and those who have knowledge that the law was violated. It is an elementary rule that what the law prohibits, under a penalty, is illegal, and it cannot, therefore, be the foundation of a right as between the immediate parties. *Wilson v. Joseph*, 107 Ind. 490; *Hedderich v. State*, 101 Ind. 571; s. c., 51 Am. Rep. 768; *Case v. Johnson*, 91 Ind. 477.

This rule also applies to those who assume to purchase from one of the parties to the transaction, but purchase with full knowledge that the law has been transgressed.

A man who assumes to transfer a right which the law forbids him from transferring, unless he does certain prescribed acts, cannot yield a valid consideration to the person with whom he deals. Where one assumes to transfer what the law prohibits him from transferring, he parts with no rights which, as to him, at least, will constitute a sufficient consideration for another's promise. If the question were between the immediate parties, we should have no hesitation in declaring, that if the promissory note sued on was executed for a patent right, transferred in violation of the statute, there could be no recovery. Nor do we think there is any doubt that the rule should be applied where the holder of the note purchased with full knowledge of the character of the transaction.

The contention of the appellant, that the statute applies only to the sale of the patent right itself, and not to the sale of the right to use and to manufacture for sale and use the patented article, cannot prevail. It is a sale of the patented right to sell the exclusive right to use and manufacture for sale and use the thing patented, for such a sale carries with it an interest in the patented right it-

self. Where the vendor sells a right to use and to manufacture for sale and use during the existence of the patent, he parts with all substantial rights in the patent in the territory embraced in the assignment. Curtis Patents, § 181; Walker Patents, § 296.

Where it is evident that the intention of an instrument is to vest in the assignee the whole and exclusive interest in a patent right for a designated territory, no ingenuity in framing the instrument will carry the transaction beyond the reach of the statute. Schemes, however cunningly contrived, or subterfuges, however ingeniously devised, will not enable the vendor of the patent right to evade the statute. Here, as elsewhere in jurisprudence, the inquiry which rules is, what was the substance of the transaction? and as that appears so will be the judgment of the court.

In the case before us, there was a grant of all the beneficial interest that the patentee possessed, and the case is therefore within the statute.

The answer avers that the appellant had knowledge of the consideration for which the note was executed, and we think she was bound to know that the note was inoperative unless the vendor of the patent right had obeyed the law. She knew, as the answer avers, that the note was given for a patent right, and she was bound to know, as matter of law, that unless the vendor had obeyed the law he could not yield a valid consideration to the maker of the note. On the face of the note it appeared that the statute had not been complied with, and this, joined to her knowledge of the consideration yielded for the note, gave her such notice as at least put her on inquiry. 1 Dan. Neg. Inst., § 198. It became her duty, with the knowledge she possessed, to ascertain whether the vendor had complied with the statute, for upon his compliance with the statute depended the validity of the note. If there was a violation of the law there could not be, as she must have known, any consideration for the promise of the purchaser of the patent right. The case is a peculiar one, for a statute so limits the powers of a vendor of patent rights that he cannot yield a consideration for a promise to pay for the assignment of a patent right, unless he has performed the duties imposed upon him. His right to secure a valid promise is restricted by the law, for if he transgresses the law by making a transfer which it forbids, his contract is illegal, and cannot constitute a valid consideration for the promise of the person with whom he deals. It seems

New v. Walker.

very clear therefore that one who has knowledge of the consideration of the promise, and finds the note not such as the statute requires, should ascertain whether the acts essential to give the vendor capacity to make a legal contract have been performed. There is a well defined and fully recognized distinction between promissory notes made illegal by statute, and those made inoperative between the immediate parties, because the consideration is one that the general rules of law condemn. It is indeed generally held that a promissory note expressly declared by statute to be void when given for a vicious consideration, is ineffective even in the hands of a *bona fide* holder. 1 Pars. Notes and Bills, 276; 1 Dan. Neg. Inst., § 197. We do not hold, or mean to hold, that knowledge of the consideration of a promissory note will in ordinary cases put a purchaser upon inquiry; on the contrary, we understand the law to be that in ordinary cases knowledge of the consideration, even when imparted by the note itself, will not prejudice the rights of a good-faith purchaser, unless the consideration is such as invalidates the note or is legally insufficient. *Hereth v. Merchants' Nat'l Bank*, 34 Ind. 380; *Doherty v. Perry*, 38 Ind. 15; *Bank of Commerce v. Barrett*, 38 Ga. 126; *Heard v. Dubuque Co. Bank*, 8 Neb. 10; s. c., 30 Am. Rep. 811; *Stevenson v. O'Neal*, 71 Ill. 314. Here however the purchaser of a note given for a patent right is chargeable with knowledge of the law if he knows the consideration for which the note was executed to be a patent right, for the statute, in express terms, prescribes who shall have authority to vend such rights, and the transfer by one who has no such authority, but who transgresses the law in making the transfer, is not a valid consideration for the promise contained in the note.

Where it appears, as it does in the answer before us, that the note was given for a patent right, that this fact was known to the purchaser of the note before its purchase, and that the clause required by the statute was not in the note, the burden is upon the holder of the note to show that his indorser took the note without notice as to the nature of the consideration. 1 Dan. Neg. Inst., § 198.

The transfer of a patent right could not, as we have said, be a valid consideration as against the original parties or those who bought with notice of the character of the consideration, and it is therefore incumbent upon one who buys with the notice to show, either compliance with the law, or that his indorser was, in all essential particulars, a good-faith purchaser of the note. We do

not impugn the general doctrine that one who buys from a good-faith purchaser will secure a valid right although he may himself have notice of the infirmity in the consideration, for that we regard as well settled law; but we hold that where the person who buys a note not containing the words required by statute, and knows that it was executed for a patent right, must at least affirmatively show that his indorser was a purchaser in good faith in all that the term implies. The case is closely analogous to those which hold that if a promissory note is obtained by fraud, it devolves upon the holder to prove that he was a purchaser in good faith. *Eichelberger v. Old Nat'l Bank*, 103 Ind. 401; *Mitchell v. Tomlinson*, 91 Ind. 167; *Baldwin v. Fagan*, 83 Ind. 447; *Hinkley v. Fourth Nat'l Bank*, 77 Ind. 475; *Zook v. Simonson*, 72 Ind. 83; *Harbison v. Bank, etc.*, 28 Ind. 133.

The logical result of this reasoning is that the appellee's answer exhibits a complete defense to the appellant's cause of action. The reply of the appellant alleges, in substance, that the note was purchased by George W. New before maturity; that he paid \$400 for it; that when he purchased the note he had no knowledge that it was given for a patent right; that at the time the appellant purchased the note from George W. New, she had no knowledge or information that it was executed for a patent right, and that she purchased the note before maturity and paid full value for it.

A material question involved in a consideration of the sufficiency of this reply is the character of the promissory note on which the complaint is based, but we think there is no serious difficulty in solving this question, material as it is, for we have no doubt that it is a commercial note, negotiable by the law merchant. A note payable to bearer is negotiable as commercial paper, if as does this one, it possesses the other essential requisites of such negotiable instruments. *Mellon v. Gibson*, 97 Ind. 158; *Hall v. Allen*, 37 Ind. 541; *Riley v. Schawacker*, 50 Ind. 592; *Dan. Neg. Inst.*, § 663.

Having determined that the promissory note on which the action is founded is negotiable as commercial paper, the next question is, what are the rights of the appellant as the *bona fide* holder of the paper? For there can be no doubt under the confessed allegations of the reply that she is such a holder. She is such in the strongest light, for she purchased from a good-faith owner, and is herself free from fault and innocent of wrong. *Hereth v. Merchants' Nat'l Bank, supra*; *Newcome v. Dunham*, 27 Ind. 285.

The decisions agree, that where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so no matter into whose hands it may pass. The rule is thus stated by the court in *Vallett v. Parker*, 6 Wend. 515 : "Wherever the statute declares notes void, they are and must be so, in the hands of every holder ; but where they are adjudged by the court to be so, for failure, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

It is said by a late writer in stating the same general rule, that "when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it." 1 Dan. Neg. Inst., § 197. We regard this author's statement as substantially expressing the general rule ; and accepting it as correct, the pivotal question is whether our statute does expressly, or by necessary implication, declare that notes given to vendors of patent rights who have disobeyed the law shall be void ? There is certainly no express declaration in the statute that such notes shall be void, nor do we think that there is any necessary implication that they shall be void. A man may be guilty of a misdemeanor, and yet notes taken by him in the transaction which creates his guilt may not be void in the hands of an innocent holder. A familiar illustration of this principle is afforded by those cases which declare that a note given in consideration of the suppression of a criminal prosecution is inoperative as between the immediate parties, but valid in the hands of a *bona fide* purchaser. This is the settled law, although the compounding of a felony is made a crime by statute. Our opinion is, that a statute making it a crime to take promissory notes in a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority. *Anderson v. Etter*, 102 Ind. 115 ; *Vallett v. Parker*, *supra* ; *Taylor v. Beck*, 3 Rand. (Va.) 316 ; *Glenn v. Farmer's Bank*, 70 N. C. 191 ; *Smith v. Columbus State Bank*, 9 Neb. 31 ; *Haskell v. Jones*, *supra* ; *Palmer v. Minar*, 8 Hun, 342 ; *Cook v. Weirman*, 51 Iowa, 561.

A party who executes a promissory note, negotiable as commercial paper, fair on its face and complete in all its parts, puts in circulation an instrument which he knows is the subject of barter and

sale in the commercial world, and it is his own fault if he does not put into it the words which will warn others not to buy it in the belief that it will be free from all defenses. The experience of the business world has shown the necessity of affixing to promissory notes the quality of negotiability, and commercial transactions would be seriously disturbed if notes, fair on their face and containing the required words of negotiability, were not protected in the hands of innocent purchasers. It is therefore not the policy of the law to multiply exceptions to the general rules governing notes negotiable by the law merchant, so that in such case as this it cannot, without an indefensible departure from that policy, be held that the promissory note is not protected in the hands of a good-faith holder. Nor can such a step be taken without wandering from the course marked and defined by the long established principle, that where one of two innocent persons must suffer from the act of a third person, he who puts it in the power of the third to do the act must bear the loss. To our minds it seems clear that this principle rules here, for the man who executes to a vendor of patent rights a promissory note, in full and perfect form, puts it in his power to wrong others by selling the note as an article of commerce.

We regard the reply as unquestionably good, and adjudge that the trial court erred in sustaining the demurrer to it.

It is contended by the appellee's counsel that as there is a special finding showing that the appellant was not a purchaser in good faith, no harm was done her in sustaining a demurrer to the reply. We cannot concur in this view. The decision in *Sohn v. Cambern*, 106 Ind. 302, does not sustain the counsel's position. In that case there was no demurrer, but the attack was by the assignment of errors, and besides, all that was said in that case, which is in any degree relevant to the present subject, was addressed to the provisions of section 345 of the code respecting the overruling, not the sustaining, of demurrers. It cannot be legally possible that if a party's reply, presenting facts which completely avoid and nullify the answer of his adversary, is held to be insufficient, the special finding can cure the error. If his pleading is overthrown, he is not entitled to give evidence in support of the theory which it asserts, and he is therefore necessarily and materially injured by the ruling striking it down. Where a party duly excepts to a ruling on demurrer, which overthrows a valid pleading, he does not waive any rights by suffering the case to proceed to trial, nor is he bound to

Quick v. Milligan.

offer evidence upon the subject covered by his pleading, for his exception to the ruling on the demurrer effectually asserts and preserves his rights.

Judgment reversed.

QUICK V. MILLIGAN.

(108 Ind. 419.)

Deed — escrow — delivery before performance of condition — estoppel.

Where a deed is put in the hands of a third person, to be delivered only on payment of the purchase-money, the grantee being already in possession of the land, and subsequently obtaining the deed without payment, by fraudulent representations to the custodian, and deeding the land to a purchaser in good faith, the original grantor is estopped as to such purchaser.

THE opinion states the case.

J. McCabe and *E. F. McCabe*, for appellant.

C. V. McAdams, for appellee.

ELLIOTT, C. J. We condense from the special finding of the trial court these material facts:

In October, 1884, the appellant, her sisters, Catherine Evans and Sarah Pugh, and their nephew, Samuel Etchison, were the owners in fee of the undivided one-fifth part of a tract of land, and Samuel Etchison was the occupant of the land, yielding rent to his co-tenants. In the month named Etchison made a contract with each of his co-tenants for the purchase of their respective interests in the land. Pursuant to the terms of the contract the appellant, who lived in Jasper county, in conjunction with her husband, on the 27th day of December, 1884, signed and acknowledged a deed conveying the land to Etchison. This deed she sent by mail to her sister, Catharine Evans, with instructions to deliver it to Etchison only upon the condition that he paid the amount of the purchase-money of the land, \$317, and not to deliver the deed until the money was paid. These instructions were received by Catherine Evans before she gave the deed to Etchison. After these instructions had been imparted to her, Catherine Evans did, in violation of those instructions, deliver the deed to the grantee named in it,

without the payment of the purchase-money, delivering, at the same time, her own deed, and her sister Sarah also delivered hers. The deeds were all delivered on the false and fraudulent representation of Etchison that he would immediately mortgage the land, thus obtain money, and pay for the land. The delivery of the deed to Etchison was made without the knowledge or consent of the appellant. The deeds received by Etchison were placed on record on the 5th day of March, 1885. After the deeds were recorded, and while Etchison was in possession of the land, it was purchased of him in good faith, without notice of any fraud, for a fair price fully paid, and in the belief that the deeds were valid, and with knowledge of Etchison's possession, by the appellee, George Milligan, and a deed was executed to him by Etchison.

It is the contention of the appellant that on these facts the law should have been declared to be with her. This contention is asserted by counsel on the strength of the cases which hold, that where a deed is placed in the hands of a third person to be delivered to the grantee upon the performance of a certain condition by the grantee, a delivery in violation of the condition will not make the deed effective. In support of this position counsel cite many cases, among them *Berry v. Anderson*, 22 Ind. 36; *Robbins v. Magee*, 76 Ind. 381; *Freeland v. Charnley*, 80 Ind. 132; *Vaughan v. Godman*, 94 Ind. 191; *Burkam v. Burk*, 96 Ind. 270; *Stringer v. Adams*, 98 Ind. 539; *Vaughan v. Godman*, 103 Ind. 499; *Harkreader v. Clayton*, 56 Miss. 383; s. c., 31 Am. Rep. 369; *Chipman v. Tucker*, 38 Wis. 43; s. c., 20 Am. Rep. 1; *Stanley v. Valentine*, 79 Ill. 544; *Smith v. South Royalton Bank*, 32 Vt. 341; s. c., 76 Am. Dec. 179; *People v. Bostwick*, 32 N. Y. 445; *Black v. Shreve*, 13 N. J. Eq. 455; *Dyson v. Bradshaw*, 23 Cal. 528; *Ogden v. Ogden*, 4 Ohio St. 182; *White v. Core*, 20 W. Va. 272.

We have not the slightest doubt that the abstract proposition stated by counsel is correct, for we understand it to be a rudimentary rule in the law of real property, that a deed delivered as an escrow is not effective if placed in the hands of the grantee in violation of a condition upon which the person who holds as an escrow is authorized to deliver it. If this proposition is broad enough to cover the case, the appeal must be sustained; but we cannot grant this essential requisite, for there remains the question of estoppel. It might be conceded, that in ordinary cases, where the grantor remains in possession, the delivery of a deed, by

Quick v. Milligan.

one who received it as an escrow, in violation of the condition upon which he was authorized to deliver it, would not make the deed effective to convey title, and yet there might be circumstances which would estop the grantor from asserting title against a *bona fide* purchaser.

Title to land may be transferred and acquired by estoppel. *Pitcher v. Dove*, 99 Ind. 175, and cases cited. In speaking of the application of the doctrine of estoppel to land, a recent writer says: "This principle applies irrespective of the nature of the property sold, and the estoppel will be so moulded as to prevent fraud and injustice in whatever form it may present itself." Herman Estop. and Res Adj., § 931.

The Supreme Court of the United States, in discussing the general subject, said: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice." *Dickerson v. Colgrove*, 100 U. S. 578.

In our own court it has been said: "It is not necessary in order to the existence of an equitable estoppel that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which it would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct." *Anderson v. Hubble*, 93 Ind. 570; s. c., 47 Am. Rep. 304.

This doctrine has been asserted by this court in other cases, and is well sustained by the decisions of other courts. *Pitcher v. Dove*, *supra*; *Vilas v. Mason*, 25 Wis. 310; *Foster v. Bettsworth*, 37 Iowa, 415; *Rudd v. Matthews*, 79 Ky. 479; s. c., 42 Am. Rep. 231; *Racine Co. Bank v. Lathrop*, 12 Wis. 466; *Chynoweth v. Tenney*, 10 Wis. 397; *Continental Nat'l Bank v. National Bank*, 50 N. Y. 575; *Blair v. Wait*, 69 N. Y. 113.

The wrong constituting the legal fraud is the repudiation of what the conduct of the party has made appear true, to the injury of another, who in good faith has acted upon an apparent state of facts created by the conduct of the person who makes the denial of

what his conduct implies. Negligence may sometimes constitute legal or constructive fraud, as is well illustrated by the forcible opinion in *Stevens v. Dennett*, 51 N. H. 324, where it was said: "Thus, negligence becomes constructive fraud, although strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and gross negligence may be deemed compatible."

There is another principle applicable here, and that is this: Where one of two innocent persons must suffer, he must be the sufferer who put it in the power of the wrong-doer to cause the loss, or as it has been said: "He certainly who trusts most ought to suffer most." Where one of two innocent parties must suffer, he through whose agency the loss occurred must sustain it. *Le Neve v. Le Neve*, 3 Atk. 646; *New v. Walker*, 108 Ind. 365; *Hunter v. Fitzmaurice*, 102 Ind. 449.

It is also a familiar principle that where one is in possession of land and has a deed of record, the possession will be referred to his deed, unless there are facts known to one who is about to acquire an interest in the land indicating a different possessory right. 1 Washburn Real Prop., *95. Possession is often presumptive evidence of title, and one who finds on record a deed duly executed and recorded may surely act upon the presumption that as the paper title and the possession coincide, the possession is under the deed. 1 Washburn Real Prop., *35.

In discussing a question very similar to the one before us, MARSHALL, C. J., said: "Titles which according to every legal test are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously obstructed, if this principle were overturned." *Fletcher v. Peck*, 6 Cranch, 87, 133. This doctrine was unqualifiedly approved in *Somes v. Brewer*, 2 Pick. 184; s. c., 13 Am. Dec. 406.

It is clear to our minds that these principles carry the case for the appellee, for it was the appellant who put it in the power of

 Rice v. Boyer.

the wrong-doer to do the act complained of. She it was who suffered him to remain in possession of land, and placed in another's hands a deed which gave to that possession the fullest and most complete indicia of absolute ownership. The purchaser found the vendor equipped with the most potent evidences of ownership, for he had a recorded conveyance, and he had possession. There was nothing wanting to an absolute and perfect title so far as visible and ascertainable facts disclosed.

Possession by the grantee named in the deed is an important element in the case, and it is an element that distinguishes the case from those cited by the appellant. Had the grantor retained possession, those cases might control, but here it was the grantee who had possession of the land. If a purchaser is not safe in buying where there is on record a properly framed deed, and the person named in the deed is in possession of the land conveyed by the deed, then indeed would titles be insecure and the purchase of lands hazardous. We have no doubt that where the two great elements of ownership, a deed and possession, are united in one person, a *bona fide* purchaser will be protected, although the person to whom the deed was intrusted to be delivered on the performance of a condition, may have delivered the deed in violation of his duty.

Judgment affirmed.

 RICE V. BOYER.

(108 Ind. 472.)

Infancy — contract — fraudulent representation as to age.

An action for deceit lies against an infant who has obtained property by the fraudulent representation that he was of age, and refuses to pay for it.*

ACTION for deceit. The opinion states the case. The defendant had judgment below.

F. F. Moore, for appellant.

J. V. Kent and *J. W. Merritt*, for appellee.

ELLIOTT, C. J. It is alleged in the complaint of the appellant, that the appellee, with intent to defraud the appellant, falsely and

* See note, 37 Am. Rep. 413.

fraudulently represented that he was twenty-one years of age; that relying on this representation, the appellant was induced to sell and deliver to the appellee, on one year's credit, a buggy and a set of harness; that the appellee, in payment for the property, delivered to appellant a buggy, and executed to him a promissory note, payable one year after date, and also executed a chattel mortgage to secure the payment of the note; that the appellee's representation was untrue; that he had not attained the age of twenty-one years; that on account of appellee's nonage the note cannot be enforced; that the appellee avoided his note and mortgage by a sale of the mortgaged property, "and repudiates and refuses to be bound by his contract in reference thereto;" that the appellant brings into court the note and mortgage executed to him, and tenders them to the appellee. Prayer for judgment for the value of the property delivered to appellee.

To this complaint a demurrer was sustained, and error is assigned on that ruling.

The appellee's counsel defend the ruling principally upon the ground that the action was prematurely brought, inasmuch as it cannot be determined that any injury will be done the appellant until the expiration of the year fixed for the payment of the property purchased of the appellant. We agree with counsel that the contract is voidable, not void, and that the appellee might have performed it notwithstanding his nonage if he had so elected. *Price v. Jennings*, 62 Ind. 111; *Board, etc., v. Anderson*, 63 Ind. 367; *Shrock v. Crowl*, 83 Ind. 243.

But this principle is not broad enough to meet the averment of the complaint, that the appellee has repudiated his contract and refuses to be bound by it. As the authorities relied on by counsel do not fully cover the case, further investigation is necessary, and the first step in this investigation is to ascertain and declare the effect of the infant's repudiation of his contract.

In *Shrock v. Crowl*, *supra*, the holding in *Mustard v. Wohlford*, 15 Gratt. 329; s. c., 76 Am. Dec. 209, that where the voidable act of an infant is disaffirmed, it avoids the contract *ab initio*, is fully approved. If this is the law, then when the appellee repudiated his contract, he destroyed it for all purposes. It no longer bound him, nor could he take any benefit from it. If the contract was destroyed back to the beginning, it ceased to be operative for anybody's benefit. We think the principle of law is correctly stated

Rice v. Boyer.

in the cases to which we have referred, and that the conclusion we have stated is the logical, and indeed inevitable sequence of that principle. Tyler Inf. and Cov. 78.

An infant may repudiate a contract respecting personal property during nonage. *Briggs v. McCabe*, 27 Ind. 327; *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van Court*, 100 Ind. 113; s. c., 50 Am. Rep. 774; *Houss v. Alexander*, 105 Ind. 109; s. c., 55 Am. Rep. 189; *Hoyt v. Wilkinson*, 57 Vt. 404; *Price v. Furman*, 27 Vt. 268; s. c., 65 Am. Dec. 194; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 119; s. c., 31 Am. Dec. 285.

The repudiation by the appellee was therefore a complete avoidance of the contract, effectually putting an end to its existence both as to him and as to the adult with whom he contracted.

It is evident from what we have said, that the ground taken by the appellant's counsel is not tenable, for when their client repudiated the contract, as it is alleged he did, it ceased to be effective for any purpose.

It is contended by appellee's counsel that the appellant cannot recover the value fixed on the property by the contract, and that the complaint is therefore insufficient. There is a plain fallacy in this argument. If a complaint states facts entitling the plaintiff to relief it will repel a demurrer, although it may not entitle him to all the relief prayed. *Bayless v. Glenn*, 72 Ind. 5, and cases cited. The question as to the measure of damages is not presented by a demurrer to a complaint where a cause of action is presented entitling the plaintiff to some damages, for the question which the demurrer presents is, whether the facts are sufficient to constitute a cause of action.

The material and controlling question in the case is this: Will an action to recover the actual loss sustained by a plaintiff lie against an infant who has obtained property on the faith of a false and fraudulent representation that he is of full age?

Infants are in many cases liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indirectly enforce the contract. Judge COOLEY says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract

indirectly by counting on the infant's neglect to perform it, or omission of duty under it as a tort." Cooley Torts, 106. In another place the same author says: "So if an infant effects a sale by means of deception and fraud, his infancy protects him." Cooley Torts, 107. Addison, following the English cases, says: An infant is not liable "if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract as well as a tort." Add. Torts, § 1314.

Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. *Howlett v. Haswell*, 4 Camp. 118; *Green v. Greenbank*, 2 Marsh. 485; *Vasse v. Smith*, 6 Cranch, 226 (1 Am. Lead. Cas. 237); *Studwell v. Shapter*, 54 N. Y. 249.

It is also generally held that an infant is not estopped by a false representation as to his age, but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by a representation. *Carpenter v. Carpenter*, 45 Ind. 142; *Sims v. Everhardt*, 102 U. S. 300; *Whitcomb v. Joslyn*, 51 Vt. 79; s. c., 31 Am. Rep. 678; *Conrad v. Lane*, 26 Minn. 389; s. c., 37 Am. Rep. 412; *Wisland v. Kobick*, 110 Ill. 16; s. c., 51 Am. Rep. 676; *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301.

It is evident from this brief reference to the authorities, that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age. *Johnson v. Pie*, 1 Lev. 169; *Price v. Hewett*, 8 Exch. 146; *Liverpool, etc., Ass'n v. Fairhurst*, 9 Exch. 422; *Brown v. Dunham*, 1 Root, 272; *Curtin v. Patton*, 11 Serg. & R. 305; *Homer v. Thwing*, 3 Pick. 492; *Word v. Vance*, 1 N. & McC. 197; s. c., 9 Am. Dec. 683; *Fitts v. Hall*, 9 N. H. 441; *Norris v. Vance*, 3 Rich. 164; *Gibson v. Spear*, 38 Vt. 311.

Our judgment however is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is

treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age, is well sustained by authority, and it is strongly intrenched in principle, although as we have said, there is a fierce conflict. It has been sanctioned by this court, although perhaps not in a strictly authoritative way, for it was said by WORDEN, J., speaking for the court, in *Carpenter v. Carpenter*, *supra*, that "the false representation by the plaintiff, as alleged, that he was of full age, does not make the contract valid, nor does it estop the plaintiff to set up his infancy in avoidance of the contract; although it may furnish ground of an action against him for the tort. See 1 Pars. Cont. 317; 2 Kent Com. (12th ed.) 241."

The reasoning of the court in the case of *Pittsburgh, etc., Ry. Co. v. Adams*, 105 Ind. 151, tends strongly in the same direction.

In *Neff v. Landis*, 1 Atlantic R. 177, it was said: "It cannot be doubted that a minor, who under such circumstances obtains the property of another by pretending to be of full age and legally responsible, when in fact he is not, is guilty of a fraud by false pretense, for which he is answerable under the criminal law. 2 Whart. Crim. Law, 2099."

If it be true, as asserted in the case from which we have quoted, that an infant who falsely and fraudulently represents himself to be of full age is amenable to the criminal law, it must be true, that he is responsible in an action of tort to the person whom he has wronged. The earlier English cases were undoubtedly against our conclusion, but the later cases seem to take a different view of the question; thus, in *Ex parte Unity, etc., Banking Ass'n*, 3 DeG. & J. 63, it was held that in equity an infant, who falsely and fraudulently represented himself to be of full age, was bound to pay the obligation entered into on the faith of his representation.

In the note to the case of *Humphrey v. Douglass*, 33 Am. Dec. 177, Mr Freeman says, in speaking of the decision in *Kilgore v.*
VOL. LVIII — 8

Jordan, 17 Tex. 341, that "aside from any question of authority, the rule given, in the case last cited, by HEMPHILL, C. J., as the rule of the Spanish, derived from the civil law, that if a minor represents himself to be of age, and from his person he appears to be so, he will be bound by any contract made with him, seems to be most consonant with reason and justice."

Mr. Pomeroy pushes the doctrine much farther than we are required to do here, for he says: "If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were adult, and may cancel a conveyance or executed contract obtained by fraud." 2 Pom. Eq. Jur., § 945.

In addition to cases cited which sustain our view may be cited the following authorities: *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly, 334; *Schuneman v. Paradise*, 46 How. Pr. 426; Tyler Inf. 182; 1 Pars. Cont. 317, note; 1 Story Eq. Jur. 385.

The English cases recognize a distinction between suits of equitable cognizance and actions at law, and declare that a representation as to age, when falsely and fraudulently made, will bind an infant in equity. *Ex parte Unity, etc., Ass'n, supra*, and authorities cited. Under our system we can recognize no such distinction, a distinction which is, as we think, a shadowy one under any system, for in our system the rules of law and equity are merged and mingled. Under such a system as ours courts should pursue such a course as will render justice to suitors under the rules of equity, which after all are but the embodiment of the principles of natural justice. It cannot be the duty of any court of Indiana to deny substantial justice because the complaint states a cause of action in a peculiar form, for under our system courts must render such judgments as yield justice to those who invoke their aid, irrespective of mere forms, in all cases where the substantial facts are stated, and are such as entitle the party to the general relief sought. They will not inquire whether the proceeding which asks their aid is at law or in equity, but they will render justice to those who ask it in the method prescribed by our Code of Civil Procedure.

It is laid down as a general rule by all the text-writers, that infants are liable for their torts, but many of these writers, when they consider such a question as we have here, are sorely perplexed by the early English decisions, and by subtle refinement attempt to discriminate between pure torts and torts connected with con-

Rice v. Boyer.

tracts, and to create an artificial class of actions. Their reasoning is not satisfactory. Aside from mere personal torts, it is scarcely possible to conceive a tort not in some way connected with a contract, and yet all the authorities agree that the liability of infants is not confined to [mere personal torts. There is a connection between a contract and a tort in every case of bailment of the bargain and sale of personal property, and of the purchase and sale of real estate, and if an infant is not responsible for his fraudulent representation of his age, in connection with such transactions, there is not within the whole range of business transactions any case in which he could be made liable for his fraud. There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley Torts, 112, authorities cited in notes. The cases certainly do agree; it is indeed difficult, if not impossible, to perceive how it could be otherwise, that although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is, that he is liable, to the extent of the loss actually sustained, for his tort where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question; can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of a promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. Nor does such a rule open the way for a designing man to take advantage of an infant, for it holds him to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, because it allows him compensation only for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss.

It is worthy of observation that in the cases which hold that an infant's representation will not estop him to deny his disability, it is generally declared that he may nevertheless be held liable for his tort.

It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud, because reasona-

ble diligence, which is exacted in all cases, would warn the plaintiff of the nonage of the defendant. On the other hand, the infant may be in years, almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor, who is really twenty years and ten months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is twenty-one years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contract, but for the loss occasioned by his fraud?

The rule which we adopt will enable courts to protect, in some measure, the honest and diligent, but none other, who are misled by a false and fraudulent representation, and it will not open the way to imposition upon infants, for in no event can any thing more than the actual loss sustained be recovered, and no person who trusts, where fair dealing and due diligence require him not to trust can reap any benefit. It will not apply to an executory contract which an infant refuses to perform, for in such a case, the action would be for the breach of contract, and the terms of our rule forbid such a result, but it will apply where an infant, on the faith of his false and fraudulent representation, obtains property from another and then repudiates his contract. Any other rule would in many cases suffer a person guilty of positive fraud to escape loss, although his fraud had enabled him to secure and make way with the property of one who had trusted in good faith to his representation, and had exercised due care and diligence. We are unwilling to sanction any rule which will enable an infant who has obtained the property of another, by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to another, and when asked to pay its just and reasonable value successfully plead his infancy. Such a rule would make the defense of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defense.

Judgment reversed with instructions to overrule the demurrer to the complaint.

Judgment reversed.

Naltner v. Dolan.

NALTNER V. DOLAN.

(108 Ind. 500.)

Attorney and client — deposit of client's money in attorney's name — liability for loss.

Where an attorney deposits his client's moneys in a solvent bank, in his own name in a separate account, but with no indication of the trust, he is liable for loss by the subsequent insolvency of the bank, notwithstanding he was prevented from transmitting the moneys by garnishment proceedings against him.

ACTION stated in the complaint.

S. Claypool and W. A. Kitcam, for appellant.

J. R. Courtney, for appellee.

MITCHELL, J. Naltner, on the 24th day of February, 1883, commenced proceedings in attachment against Dolan, and on the same day caused a summons in garnishment to be served on the appellants herein. On the 7th day of March following, upon his intervening petition, Montague was admitted as a party to the proceeding. He filed a cross complaint, in which he alleged, in substance, that the fund in the hands of the appellants, being the subject of the attachment and garnishee proceeding, had been assigned to him by Dolan, for a valuable consideration, before the proceedings were commenced. He prayed judgment for the recovery of the money.

The appellants, with the general denial, answered specially, admitting the possession of a fund which they averred had come to their hands as the attorneys of Dolan. They alleged that they had been notified by Montague of his claim after the proceedings in garnishment had been commenced, and averred their readiness to pay the money to whomsoever the court should adjudge entitled thereto. Other answers were filed, to which demurrers were sustained.

The facts were found specially by the court, and are presented in the following summary: Dolan, who at the time the suit was commenced lived in Illinois, owed Naltner \$600, then due.

The appellants, as attorneys, had in their hands for collection a claim in favor of Dolan, against the Indiana, Bloomington and Western Railway Company, which Dolan, on the 13th day of September, 1882, transferred for value to Montague. On February 24, 1883, the day on which the attachment suit was commenced, appellants received from the clerk of the United States District Court, for the district of Indiana, checks for something over \$80,000 which was in payment of claims against the Indiana, Bloomington and Western Railway Company, which payment was made to them in behalf of Dolan and many others of their clients. Dolan's claim against the railway company was \$600. Upon receiving the check they deposited it with the Indiana Banking Company, which was then in good standing, the deposit being to the credit of themselves in their firm name. The money thus received belonged to some hundreds of their clients, and the computation of interest, and the division to each of his share required several days' continuous work before distribution could be made.

The appellants were lawyers, partners, actively engaged in practice. They had an account at the bank in question in which all money collected for, and belonging to their various clients was deposited and checked out in the firm name, but such moneys were not mingled with their own.

Before they had time or opportunity to pay out the money in controversy, the appellants were garnished at the suit of Naltner. They received notice of the assignment to Montague, February 28, 1883, four days after the suit was commenced. Montague, within a few months after giving notice of his claim, and while the proceedings in garnishment were pending, made demand on the garnishee defendants for the money remaining in their hands, which was derived from the Dolan claim.

On the 9th day of August, 1883, the Indiana Banking Company, having until that time continued in good standing and credit, failed. A receiver was appointed for the bank August 13, 1883. The appellants brought the certificate of the receiver of the bank for the money in dispute into court, and offered to surrender it to the person entitled as the court should direct. The amount remaining in their hands in the manner above stated, was \$445.69.

Conclusions of law were stated favorable to a recovery by Montague against the appellants of the amount thus remaining in their hands.

Do the facts found warrant the conclusion of law stated?

Money belonging to a client having been received by the attorneys, in payment of a claim left with them for collection, the transmission of such money having been arrested by garnishee process before an opportunity for transmitting it occurred, the question is, having acted in the utmost good faith, and without any suggestion of fault or neglect, are the attorneys responsible for the continued solvency of the bank in which such funds were deposited in their own name, but not with their own funds, notwithstanding the bank was in good credit when the deposit was made?

The receipt of money by an attorney, under the circumstances disclosed in this case, does not *ipso facto* create the technical relation of debtor and creditor between the attorney and client. It is because it does not that a suit cannot be maintained by the latter against the former without first making a demand. Money so collected belongs to the client. The attorney occupies toward it the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund. The circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee. While it is preserved in its trust character, if he exercises the same caution in respect to depositing it, if a deposit becomes necessary or proper, as a prudent man would in regard to his own money, and a loss happens, he will be excused. *Norwood v. Harness*, 98 Ind. 134; s. c., 49 Am. Rep. 739; *State, ex rel., v. Greensdale*, 106 Ind. 364; s. c., 55 Am. Rep. 753.

The authorities however distinguish between cases in which the deposit was made in such a manner as to preserve its trust character on the books of the bank in which the fund was deposited, and those in which the owner of the fund might be put to the trouble of proving by extraneous evidence that the fund was not the individual money of his trustee. Whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the *cestui que trust* has his election, either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such manner, as on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assignee, or legal representative, to claim it as the fund of the depositor, the *cestui que trust* has the option to do likewise. *Merket v. Smith*,

33 Kans. 66; *McAllister v. Commonwealth*, 30 Penn. St. 586; *Morris v. Wallace*, 3 Penn. St. 319; *Jackson v. Bank, etc.*, 10 Penn. St. 61; *School District, etc., v. First Nat'l Bank*, 103 Mass. 174; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Bartlett v. Hamilton*, 46 Me. 435; 2 Pom. Eq. Jur., §§ 1067-1076; *Perry Trusts*, §§ 44-3. 441; *Story Agency*, § 208.

In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank, as to indicate in some way that it is the principal's money. If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal. *Williams v. Williams*, 55 Wis. 300; s. c., 42 Am. Rep. 708; *Norris v. Hero*, 22 La. Ann. 605; *Mason v. Whitthorne*, 2 Cold. 242; *Jenkins v. Walter*, 8 Gill & J. 218; s. c., 29 Am. Dec. 539; *Robinson v. Ward*, 2 C. & P. 60; *Macdonnell v. Harding*, 7 Sim. 178; *State v. Greensdale*, *supra*.

In such a case the good faith or intention of the trustee is in no way involved. Having for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows as a necessary consequence, when a loss occurs, he will not be permitted to say, as against his *cestui que trust*, that the fact is not as he voluntarily made it appear.

What the legal or equitable rights of the real owner of the fund would be in such a case, as against the bank, or as against attaching creditors of the depositor, has been the subject of much discussion, and of some diversity of opinion. *Pennell v. Deffell*, 4 DeG., M. & G. 372; *Farmers', etc., Bank v. King*, 57 Penn. St. 202; *School District, etc., v. First Nat'l Bank*, 102 Mass. 174; *Jackson v. Bank, supra*; *Bundy v. Town of Monticello*, 84 Ind. 119, 131, and cases cited; *McLain v. Wallace*, 103 Ind. 562; *McComas v. Long*, 85 Ind. 549; *Ellicott v. Barnes*, 31 Kans. 170, 173; *Morse Banks*, 300-302.

Whatever diversity of opinion may be found in respect to the rights of the bank, or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited. *Gilbert v. Welsch*, 75 Ind. 557; 2 Lead. Cas. in Eq. 1805.

City of Indianapolis v. Emmelman.

Having put the owner of the fund to the hazard of losing it, or of maintaining its trust character by such proof *aliunde* as may be available to him, the trustee thereby gives the former the privilege of treating the latter as his debtor, or of supplying the proof, or accepting his admission of the facts, at his option.

Applying the principles stated to the facts found, the conclusion follows, that the appellants assumed the risk that the bank, in which the fund was deposited in their name, and from which it could only have been drawn by their check, would be able to respond with the money when their check for it should be presented.

The fact that none but money belonging to clients was deposited in the account in which the fund in question was placed does not alter the case. The controlling consideration is, that it was deposited to the credit of the firm, without any thing to designate or preserve its trust character. They took and retained the legal title to the deposit in themselves. In the event of a controversy, the character of the fund would have depended wholly on extraneous proof. This being so, the owner had the right to elect to stand upon the title to the deposit, as he found it. Having so elected, there is no rule of law which authorizes any inquiry into the motives for so taking the title, short of an express or implied direction from the owner of the fund.

The judgment is affirmed, with costs.

Rehearing denied.

Judgment affirmed.

CITY OF INDIANAPOLIS v. EMMELMAN.

(106 Ind. 530.)

Municipal corporation — negligence — dangerous excavation for bridge — infant.

A city, in constructing a bridge, in continuation of a street, excavated the bed of the stream, and built a levee from the bank to the excavation, leaving it unwatched and without safeguards. A child, five years old, at play, fell into the excavation and was drowned. The city authorities knew the habit of young children to play in the neighborhood. *Held*, that the city was liable.

ACTION for death of plaintiff's son by negligence. The opinion states the case. The plaintiff had judgment below.

VOL. LVIII — 9

City of Indianapolis v. Emmelman.

C. S. Denny, D. V. Burns and W. L. Taylor, for appellant.

J. S. Duncan, C. W. Smith and J. R. Wilson, for appellee.

MITCHELL, J. This action was brought against the city of Indianapolis by Henry Emmelman, to recover damages for wrongfully causing the death of the plaintiff's infant son.

The complaint charges, that on the 23d day of July, 1883, the city of Indianapolis was engaged in constructing a bridge over Pleasant run, a small stream of water running through a portion of the city, at a point where Spruce street crossed the above-mentioned stream. It is alleged that preparatory to the erection of the proposed bridge, the city caused a deep square hole to be dug in the bed of the stream, which hole had abrupt perpendicular sides, and which became and remained filled with water. During the progress of the work, the city constructed a levee or dam from the edge of the stream out to the hole, so as to prevent the water from standing in the bed of the stream between the hole and the north bank, and in such manner as to afford an easy approach over the levee to the pit or hole.

It was averred further that a large number of families, having small children, resided in the immediate neighborhood of the crossing of Spruce street over the stream, and that many small children were accustomed to play in that vicinity, which fact was well known to the defendant.

The water outside the hole was only a few inches in depth, yet the defendant, notwithstanding it knew all the facts, negligently failed to place any barriers or warning of danger about the pit, so as to prevent children from falling in, when its workmen quit the premises.

The complaint avers that the plaintiff had no knowledge of the existence of the pit, or of any danger in the vicinity, and that the boy was too young, being about five years old, to appreciate the danger. That on the date first above mentioned, the plaintiff's son, without any fault whatever on the part of the plaintiff, while the hole was so negligently left unguarded and exposed, fell into the pit and was drowned.

A demurrer to this complaint was overruled, and the propriety of this ruling is the first question presented.

The initial proposition upon which the appellant rests its argument against the sufficiency of the complaint is, that it does not

appear from the facts averred that the city was guilty of any breach of duty, in respect to the plaintiff or his child. That the liability of the city can only be affirmed upon the theory that it has violated its duty in the premises, is too clear for serious controversy.

Speaking upon the subject, as applied to an adult, this court, in the case of *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 221; s. c., 50 Am. Rep. 783, used the following language: "Before it can be affirmed that the appellant was negligent, with respect to the transaction concerning which its omission is imputed to it as wrongful, it must appear that it was under some legal duty or obligation to the plaintiff, at the time when and place where the injury occurred, which was left undischarged. If it is liable at all, this is the foundation upon which its liability rests." *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323; s. c., 41 Am. Rep. 572.

In respect to cases such as we are considering, a learned author says: "It is important to bear in mind, in actions for injuries to children, a very simple and fundamental fact, which in this class of cases is sometimes strangely lost sight of, viz., that no action arises without a breach of duty." 2 Thomp. Neg. 1183, note.

With this rule in view, and with the further concession that in dealing with cases which involve injuries to children, courts and juries have sometimes strangely confounded legal obligation with sentiments that are independent of law, it must nevertheless be kept in mind that wherever an adult may be without incurring the imputation of being an intruder, a child may also go free from the like imputation. The same circumstances which would justify a recovery by one who had reached years of discretion, and had sustained an injury from the act of another while free from fault, would justify a recovery by an infant of such years as to be incapable of fault, provided its parents or guardian were also guilty of no neglect which could be imputed to the child. And so conversely, except when a child is seen in time so that injury to it might be avoided, persons who are lawfully using, or carrying on business on their own premises, are not liable for injuries to children, unless under the same circumstances they would have been liable to others who were equally free from fault.

The conclusion to be drawn from the approved cases on the subject is, that the owner of premises, who has neither expressly nor impliedly invited the public to come upon or pass over his grounds, is under no legal obligation to keep them free from pitfalls, or in a

condition of safety, for those who in the pursuit of their own pleasure or convenience pass over such premises, even though it be with the acquiescence of the owner. Persons passing over premises of that description exercise the privilege with its attending perils, and this without distinction as to whether or not they have arrived at an age of discretion.

Unless contrivances are placed on such premises, with an actual or constructive intent to hurt intruders, the proprietor is not liable for injuries resulting to persons, by reason of the condition in which the premises have been left, or from the prosecution of a business thereon, in which the owner had a right to engage. *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 225, and cases cited; *Gillespie v. McGowan*, 100 Penn. St. 144; s. c., 45 Am. Rep. 365; *Gramlich v. Wurst*, 86 Penn. St. 74; s. c., 27 Am. Rep. 684; *Cauley v. Pittsb., etc., Ry. Co.*, 95 Penn. St. 398; s. c., 40 Am. Rep. 664; *McAlpin v. Powell*, 70 N. Y. 126; s. c., 26 Am. Rep. 555; *Hargreaves v. Deacon*, 25 Mich. 1; *Burdick v. Choadle*, 26 Ohio St. 393; s. c., 20 Am. Rep. 767.

The foregoing and many other analogous cases, which might be cited, proceed upon the theory that the person sought to be held liable had done nothing to produce injury to others who voluntarily strayed upon or invaded the premises on which the injury occurred.

In all such cases the owner may dig an excavation in his own land, not substantially adjoining a public highway, and no action lies against him by one who has fallen into the excavation. *Hardcastle v. South Yorkshire Ry. Co.*, 4 Hurlst. & Nor. 67; *Hounsell v. Smyth*, 29 L. J. 203 (7 C. B. [N. S.] 731); *Pittsburgh, etc., R. Co. v. Bingham*, 29 Ohio St. 364; s. c., 23 Am. Rep. 751; *Sweeney v. Old Colony, etc., R. Co.*, 10 Allen, 368; *Knight v. Abert*, 6 Penn. St. 472; s. c., 48 Am. Dec. 478; *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525.

But there is a clear distinction between the cases cited and the case where an excavation is made in or so near a highway as that one, while rightfully using the highway, may without fault sustain injury by falling into the excavation. Not less clear is the distinction between a case in which an excavation is made, or something calculated to amuse or attract children is done or left, at a place where the child has a right to be, and one in which the same thing is done at a place, where in order to reach the place of danger, the child becomes an intruder upon the premises of another.

City of Indianapolis v. Emmelman.

Whoever while passing along, or when properly in a public street, suffers an injury while exercising the degree of care which the law requires of such persons, by falling into an excavation which has been made in or near such street, is entitled to maintain an action for such injury against the person making the excavation. In such a case, the person making the excavation comes under an obligation to make it safe in respect to all persons who have a right to use the street.

Streets are open to persons of all ages, and children are and must be permitted, to some extent at least, to go upon the streets of towns and cities, without incurring the imputation of negligence upon themselves or their parents. It would be intolerable to hold as matter of law, that a parent, having no knowledge of the presence or probability of danger, was nevertheless guilty of negligence in permitting a five-year old child to pass beyond the door yard into the street without an attendant. Whoever therefore does any thing in, or immediately adjacent to a public street, calculated to attract children of the vicinity into danger, which they cannot appreciate, owes the duty of protecting them by suitably guarding the source of danger, or in case this is impracticable, by giving timely warning to their parents and guardians of the existence of the danger. *City of Chicago v. Hesing*, 83 Ill. 204; s. c., 35 Am. Rep. 378; *City of Chicago v. Major*, 18 Ill. 349; *Niblett v. Nashville*, 12 Heisk. 684; s. c., 27 Am. Rep. 755; *Graves v. Thomas*, 95 Ind. 361; s. c., 48 Am. Rep. 727; *McAlpin v. Powell*, *supra*; *Beck v. Carter*, 68 N. Y. 283; s. c., 23 Am. Rep. 175; 2 Dill. Mun. Corp., § 1005.

The right of a child to go or be in or upon a street is in no way dependent upon the occupation or pecuniary condition of its parents. *Mayhew v. Burns*, 103 Ind. 328.

If a person of discretion, while attempting to pass over the stream in question where it crossed Spruce street, had fallen into the pit into which the child fell, no doubt could be entertained that such person, if free from contributory fault, might have recovered for an injury sustained, or if the plaintiff, without knowledge of the pit, had permitted his horse to go there for water, and it had fallen into the unguarded hole and had been injured, the liability of the city would have been beyond question.

As we have seen, the liability of the city is precisely the same in case a child, rightfully in a street, sustains injury from a defect

City of Indianapolis v. Emmelman.

created therein by the city, as in the case of an adult who is injured while free from fault from a like cause.

It would shock all sense of justice to hold that a city might dig a pit in a street and leave it so that children might be lured into it, and yet deny to parents, who were without fault, any remedy for the loss of a child.

Considered in the light of what has been said, it seems clear to us that the demurrer to the complaint was properly overruled.

The excavation into which the appellee's son fell was made in Spruce street, at a point where it crosses Pleasant run. It was made in the bed of a shallow stream, and left alone unguarded on a July day, with knowledge that children were accustomed to play in the vicinity. The city must be held to know that children are attracted to such a place in July weather. They were not intruders. It was gross carelessness on the part of the city, with such knowledge, to leave an unguarded pit filled with water in the street, into which an unsuspecting child might fall.

An inference of neglect on the part of the appellee, which might otherwise have arisen, is repelled by the averment that both he and his wife were ignorant of the existence of danger at the place in question, and by the general averment that both the parents and son were without fault.

Upon issues made the case was tried by a jury, who returned a general verdict for the plaintiff, assessing his damages at \$700, and also returned answers to interrogatories which need not be further noticed, except to say they contain nothing which controls the general verdict.

It is next contended that the evidence fails to sustain the finding of the jury. It would serve no useful purpose to rehearse the testimony to any extent. An examination of it has led us to the conclusion that all the material averments of the complaint are fairly proved by the evidence.

Conceding all that has been contended for in respect to the condition of the pit, the levee, and the street and run at the time and place of the sad occurrence, the fact remains that the city made an excavation in a street, at a place where it knew children living in the vicinity were accustomed to play, and where they had a right to be, at all proper times, without being intruders upon the premises, or invaders of the rights of any one.

In the absence of the workmen, that the children went into the shallow stream to play, was precisely what the appellant might have

Pocock v. Redinger.

expected. It owed them the duty to guard the pit in the street so that they might not fall into it and perish. Neither the father nor mother knew of nor had they reason to suspect any danger at the place in question. It was therefore not negligence to permit the child to be, with another, as the mother supposed it was, at such a place so near its home.

Over the appellant's objection the court permitted the appellee's wife to testify that she had never before the drowning of her son heard of any one being drowned in Pleasant run. In connection with all the other circumstances testified to by the witness, showing the character of the stream, and its comparative safety for children before the excavation was made, this was not objectionable.

Certain instructions were asked by the appellant and refused by the court. Without further reference to the instructions asked and refused, it may suffice to say, within the principles already referred to upon the subject of the appellant's duty and the circumstances under which the appellant would be guilty of contributory negligence, the instructions were properly refused.

Cases which impute negligence to parents who permit children of tender years to wander unattended in the vicinity of and upon railroad tracks, or other places of known or probable danger, are not controlling in a case where as here a child is permitted to go to a place at which there is no reason to suspect danger, and which would have been safe but for the breach of duty of the appellant.

We find no error.

The judgment is affirmed, with costs,

Rehearing denied.

Judgment affirmed.

POCOCK V. REDINGER.

(108 Ind. 573.)

Will — description of land — mistake.

A will contained this provision: "As to my real estate, I dispose of it as follows: I own the east half of the north-west quarter," etc., "and I hereby give and bequeath the same to my son," etc. The testator did not own the east half of the north-west quarter, but did own the west half. *Held*, that the will should be made to operate upon the land intended. (*See note, p. 74.*)

THE opinion states the case.

A. C. Capron and A. Johnson, for appellants.

M. A. O. Packard, O. M. Packard and C. P. Drumond, for appellee.

ELLIOTT, C. J. The will of Catherine E. Redinger contains, among others, this provision: "As to my real estate, I dispose of it as follows: I own the east half of the north-west quarter of section thirty-four, township thirty-two north, of range three east, in Marshall county, Indiana and I hereby give and bequeath the same to my son, Charles A. Redinger, as and for his own absolute property forever. I also own the east forty-six acres off of the south sixty-three acres of the south half of the south-west quarter of section twenty-eight, township thirty-two north, of range three east, Marshall county, Indiana, which should the same remain undisposed of at my decease, I desire my executor to appraise and sell.

The testatrix did not own the east half of the quarter section described in the will, but she did own the west half of that quarter section. The facts given in evidence show very clearly that she intended to devise to the appellee the quarter section owned by her, and that she made a mistake in specifically describing it.

The question in the case, as stated by counsel, is, whether it was competent to show by extrinsic evidence that a mistake was made in describing the land devised?

The general rule undoubtedly is, as the appellants contend, that a mistake in a will cannot be shown by parol evidence. *Judy v. Gilbert*, 77 Ind. 96; s. c., 40 Am. Rep. 289, and cases cited; *McAlister v. Butterfield*, 31 Ind. 25; *Funk v. Davis*, 103 Ind. 281. But we do not regard this case as within the rule, for in our opinion, the mistake is shown by the words of the will when applied to the subject matter upon which, as its language discloses, it was intended to operate. The words of the will show that the provision under consideration was intended to devise the land owned by the testatrix, for she introduces the subject by the words, "As to my real estate," and then says: "I own the east half of the north-west quarter of section thirty-four," and "I devise the same" to Charles A. Redinger, thus clearly showing that she meant to devise the land she owned. The words used in disposing of the second of the two parcels which

Pocock v. Redinger.

she devised add strength to our conclusion, for the testatrix says: "I also own the east forty-six acres off of the south sixty-three acres of the south half of the south-west quarter of section twenty-eight." The mistake appears, from the language of the will, without the aid of verbal declarations, for when it was shown that the testatrix did not own the east half of the quarter section, but did own the west half, no parol evidence was necessary to prove that she had made a mistake in drafting her will.

The case is within the rule declared in *Cleveland v. Spilman*, 25 Ind. 95, and *Black v. Richards*, 95 Ind. 184. The principle upon which the rule depends is, that where the will itself shows that there has been a mistake in specifically describing land which is also designated by a general description, the will may be made to operate upon the land intended to be specifically described, but which, by mistake, is incorrectly described in the specific description which follows the general. Where however the language of the will itself does not furnish evidence of mistake, a court cannot interfere upon the ground that a mistake was made by the testator.

Verbal declarations of a testator are not competent evidence to prove a mistake in a will, but evidence of facts and circumstances is. It is proper to show the situation and condition of the testator's property, but it is not proper to prove what he said, for when the instrument is written, that is deemed the expression of the testator's intention, and there the exploration for his intention must be made. It is obvious that if verbal declarations were admitted, wills might be overthrown which expressed the intention of one who could not dispute evidence of his declarations, nor give any explanation of them, and thus grave evils would result. The law however is so well settled by the authorities that discussion is unnecessary. *Funk v. Davis, supra; Judy v. Gilbert, supra.*

The trial court did therefore err in admitting evidence of the oral declarations of the testatrix; but we think this error must be treated as a harmless one, as it clearly appears from the record that the result must have been the same had this evidence not been given.

We do not depart from the ruling in *Judy v. Gilbert, supra*, and *Funk v. Davis, supra*, for we hold that the will decisively and clearly shows that the testatrix meant to devise the half of the quarter section she owned, and not any other parcel; that as it may be shown by evidence of the fact, without proof of oral declara-

tions, that she owned not the parcel specifically described, but another in the same section, the case is not within the rule declared in those cases, but is within the rule declared in *Cleveland v. Spilman*, *supra*.
Judgment affirmed.

NOTE BY THE REPORTER.—See note, 46 Am. Rep. 72.

In *Peters v. Porter*, 60 How. Pr. 422, Special Term of the Supreme Court, the testatrix devised two lots and a gore "on the southerly side of Forty-ninth street near Eighth avenue." Extrinsic evidence showed that testatrix owned no lot on Forty-ninth street, but did own property fully answering the description on One Hundred and Forty-ninth street, and that people living above One Hundredth street in speaking of the streets drop the "One Hundred." It was held that the devise carried the property on One Hundred and Forty-ninth street. Citing *Lefevre v. Lefevre*, 59 N.Y. 434; s. c., in note, 46 Am. Rep. 77.

In *Gallup v. Wright*, 61 How. Pr. 286, Special Term of the Supreme Court, the testatrix gave a legacy to her "grandniece, Fanny R. Gibson." She had no such grandniece, but she had a niece Fanny R. Gibson and a grandniece Fanny Gibson, daughter of Fanny R. Held, that extrinsic evidence was competent to show which was intended, and as the mother was nearer of kin the presumption was that she was intended.

In *McDaniel v. King*, 90 N. C. 597, where a testator devised his "home plantation," describing it in such manner as that upon the face of the will the court can see what land was meant to be included within its boundaries, held that evidence as to what the testator, at the time of making the will, "called and considered his home plantation," was properly excluded. The court said: "The words 'and bounded as above' coming next after the words 'my home plantation,' plainly indicate, and were certainly intended to indicate, what the testator meant by 'my home plantation.' He knew that his home plantation was composed of sundry tracts of land, bought from various persons, at different times, and that it was important that he should define his meaning in that respect. In the first part of the paragraph he therefore fixed the boundary with certainty, and afterward he devised his 'home plantation, and bounded as above,' to his son Nathan, in the contingencies mentioned. It appears also that he well understood his purpose and how to effectuate it. He had devised to his son James several tracts of land and much personal property, besides the land included in the boundary. All this property he gave to his son James absolutely, unless he should die without issue, in which case this property so given him should go to his surviving sons, 'with the exception hereinafter named.' Then immediately he provides the exception, to-wit, the exception of the 'home plantation, and bounded as above,' which he devises to his son Nathan, in the contingency that James should die without issue, thus leaving to the surviving brothers the tracts of land outside of the boundary, and all the personal property, including the slaves. The phrase 'and bounded as above' not only serves to indicate definitely what the testator meant by 'my home plantation,' but it points out with certainty and identifies the land devised to Nathan McDaniel in the contingency provided for, as certainly as if there had been a devise to him directly. 'Home plantation' might be definite

Pocock v. Redinger.

—it might not; but the boundary designated, specified, made it definite and certain.

"If the testator had simply excepted his 'home plantation,' then a question might have been raised as to what lands composed it, and his meaning in respect thereto.

"There is no ambiguity; nothing is left in doubt. The testator had the right to declare what should constitute his 'home plantation;' he did so by fixing a definite boundary to it—one that leaves no doubt as to what he meant, looking at the plain legal import of the terms he employed to express his purpose in the will. It is so certain there is nothing to be explained or qualified.

"Evidence cannot be heard to explain, add to, take from, modify, or contradict a will when its terms plainly indicate the testator's purpose as to persons or things mentioned in it. In such a case, it must be construed upon its own terms, just as a deed or other written instrument must be construed. If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient; and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to make a testator's will, so as to meet the convenience and wishes of those who might claim to take under it.

"It is only where the will upon its face is intelligible—sufficiently certain—free from a doubt and ambiguity in its terms and phraseology, but ambiguity is raised by something, or circumstances, extraneous, outside of, or collateral to it, that evidence dehors can be received, not to interpret or affect the will itself, but to explain and make certain the person or subject-matter to which it refers and applies.

"In case the will describes and points to the person, object or subject intended, and there is more than one person, object or thing of like description, evidence is received to remove the ambiguity, and enable the court to reject one or more of the persons or things to which the description of the will applies, and to determine the person or the subject-matter the testator understood to be signified by the description in the will. For example, if a testator devise property to his cousin John Smith, and he has two cousins of that name; in such case, parol evidence will be received to explain which of the two the provision applied to. And so also if a testator have two 'home plantations,' one in one direction from his dwelling-house and the other in another, and he devises the home plantation to his son James, James may aver and prove that the devise to him applies to, and embraces the one lying to the eastward of the other. Mr. Broom in his *Legal Maxims* gives this apt illustration on this subject: 'A devise was made of lands to M. B. for life, remainder to her three daughters, Mary, Elizabeth and Ann, in fee, as tenants in common. At the date of the will M. B. had two legitimate daughters, Mary and Ann, living, and one illegitimate, named Elizabeth'. Extrinsic evidence was held admissible to rebut the claim of the last mentioned by showing that M. B. formerly had a legitimate daughter named Elizabeth who died some years before the date of the will, and that the testator did not know of her death or of the birth

of the illegitimate daughter.' Broom Leg. Max. 475; *Barnes v. Simms*, 5 Ired. Eq. 392; *Stowe v. Davis*, 10 Ired. 431; *Institute v. Norwood*, Busb. Eq. 65; *Jones v. Robinson*, 78 N. C. 396.

"The case before us does not present a question of latent ambiguity, the question is, what constituted the 'home plantation' of the testator; he settled that definitely, and therefore the testimony offered was incompetent."

In *Taylor v. Tolen*, 38 N. J. Eq. 91, it was said: "The testator gives to his nephews and nieces, Louisa Silvers, Genevieve, Annie and Joseph Belcher and Herbert, Harmon and Joseph Baldwin, \$3,000. He had no nephew by the name of Harmon Baldwin nor any by the name of Joseph Baldwin. But he had a nephew by the name of Samuel Harbourne Baldwin, who is usually called by his middle name, Harbourne. He had a nephew (brother of the last-mentioned one) by the name of Josiah M. Baldwin, who usually goes by the name of 'Josie.' There can be no doubt that they are the persons meant by the gifts to 'Harmon' and Joseph."

In *Appel v. Byers*, 98 Penn. St. 479, a testator devised property to his nephew A. B., and died, leaving two nephews of that name — one legitimate the other illegitimate. Held, that parol evidence was inadmissible to show that testator intended his illegitimate and not his legitimate nephew to be the object of his bounty. The court said: "Without regard to illegitimacy, the better and more authoritative rule is, that the intention of the testator, as expressed in the will, must govern in its construction.

"If however there is a mistake in the description so that no one corresponds to it in all respects, but some one does in many particulars; and no other does who can be intended, such person will take. Or if the will be plain and clear on its face, and only becomes doubtful when applied to the subject-matter, extrinsic evidence of the intention of the testator may be received. Unless there be some ambiguity or obscurity on the face of the will or difficulty in finding the person or object to which it applies, extrinsic evidence should not be received to divert the will from the intention herein expressed. In *Tucker v. Seamen's Aid Society*, 7 Metc. 188, the testator gave a legacy to 'The Seamen's Aid Society in the city of Boston,' and 'The Seamen's Friend Society' claimed the legacy. The latter offered to prove that the testator had no knowledge of the existence of the society named in the will; that he did know of the other society; was deeply interested in its objects; had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener, who wrote his will, to insert the legacy as made to said society; but the scrivener, not knowing the existence of the society, told the testator the name of the society was 'The Seamen's Aid Society,' and the testator thereupon consented to have that name inserted. This evidence was held inadmissible, and that the society named and described in the will was entitled to the legacy.

"It is true in *Powell v. Biddle*, 2 Dall. 70, tried in the Common Pleas of Philadelphia in 1790, it was held that extrinsic evidence was admissible to award the legacy contrary to the express designation of the will, although the person accurately described therein existed. No question of illegitimacy arose in that case. The case is without authority to control us, and I do not find the

Pocock v. Redinger.

principle there declared, recognized by a higher court as a correct exposition of the law. On the contrary, in *Wusthoff v. Dracourt*, 3 Watts, 240, the question of admitting such evidence is discussed by Mr. Justice ROGERS. After declaring that courts of law have always leaned against parol evidence to explain the intention of the testator, and that it can be admitted only where the ambiguity arises from extrinsic circumstances, so that the evidence is admitted from necessity, he proceeds to say: 'The modern doctrine is, that where a subject exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity. Evidence is only admitted de hors the will from necessity to explain that which would otherwise have no operation.'

"If the rule were held otherwise a person could feel no security in making a will. His intention, clearly expressed in writing, and the object of his bounty found, in all respects answering the description, might be defeated, and the statute relating to wills be made practically inoperative. If the language of this will applied to two legitimate nephews, so that either could take, but for the existence and claim of the other, then parol evidence would be admissible to prove which was intended.

"In the present case there is neither patent nor latent ambiguity. The legitimate nephew precisely and in every respect answers the designation and description of the will; the other fails in law to be a nephew.

"This verdict shows that Philip Byers, the legitimate nephew of the testator, fully satisfies all the terms of the will. To him they are perfectly and solely applicable. Being thus distinctly and accurately described there is no ambiguity to be explained. There is no necessity to go beyond him to give full effect to the will. To do so would not be to solve doubts or explain any obscurity; but to create them where none existed before."

In *Patch v. White*, 1 Mack. 468, a will contained the following clause: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot No. 6 in square 408, together with the improvements thereon erected and appurtenances thereto belonging." The testator did not own lot 6 in square 408; but the plaintiff, in an action of ejectment to recover lot 8 in square 406, offered to show by parol evidence that this clause was intended as a devise of lot 8 in square 406. The evidence proposed to be given was: 1. That the testator intended to leave every thing he owned to his brothers and sisters; 2. That he did not own lot 6 in square 408, but that he did own lot 8 in square 406, which was in the same general system of lots, all the four hundred series running down in the same straight line through that part of the city; 3. That the lot designated in the will had no improvements upon it, whereas lot 8 in square 406 was improved (the lot devised being described in the clause quoted as an improved lot). He also offered to prove, as going to show the proper reading of the clause as understood by those directly interested, that since the will was admitted to probate, the widow who had a life-estate in one-third of all the property had drawn but one-third of the rents, issue and profits of lot 8 in square 406, and that the guardian of Henry Walker had drawn the other two-thirds, and that all the beneficiaries of the will had acquiesced in this. *Held*, inadmissible. The court said: "The difficulty in these cases arises from

the application of the rules governing the subject, the rules themselves being pretty plain. And first, it is to be observed that this is not a suit seeking the aid of words not written. At the same time however a court of law, though precluded from ascribing to the testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will, properly expounded, contains. The answer therefore to the question above proposed — enjoined as well as sanctioned by the general principles above mentioned — must be that any evidence is admissible which, in its nature and effect, merely explained what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written.

“The case of *Walton v. White*, 5 Md. 296, was a case of a devise of lands which were described as being ‘on the south side of Beaver Dam Branch,’ and the court says: ‘The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of the words,’ and they admitted evidence to show the true location of the branch. The principle is confirmed, almost in the same words, in the case of *Hammond v. Hammond*, 55 Md. 576. But indeed there is a perfect flood of cases, and multitudes were cited in the argument. We think however that the decision of the courts in the principal cases would not admit such testimony as is sought to be introduced here. Of citing cases there is no end, but it is to be observed that many of them are early cases before the statute, and are therefore not reliable. Such is the opinion of Redfield, Jarman and other text-book writers; and among those cited as being before the statute are the cases from Ambler and from Coke’s reports. All these are therefore not safe guides, because unquestionably the statute was intended to prevent the latitude of evidence which had hitherto prevailed. On page 115 (margin) of Wigram, it is said: ‘The principle (if any) upon which the excepted cases, taking them collectively, are founded, is by no means obvious;’ and further down, on page 116, he says: ‘How can the statute, which makes a writing indispensable, be satisfied, if the thing which is the subject of disposition, or the person who claims the benefit of it, is not described in that writing with certainty sufficient to enable the court, by the description in the writing, to determine their identity?’ In the case of *Beaumont v. Fell*, 2 P. W., the master of the rolls, although he admitted the parol evidence, said: ‘If this had been a grant — nay, had it been a devise — of land, in equity, where ‘the conscience of the heir may be affected,’ in the language of the courts, ‘if he shall insist upon the literal interpretation of a devise against the meaning well known to himself to have been intended by the testator.’ Naturally under such circumstances a court of equity might be more inclined to consider the offer of such evidence than a court of law in a dry legal action like an ejectment, which is governed by technical rules. By the statute of Maryland of 1798, chapter 101, all devises of any land, etc., shall be in writing, signed by the party devising the same, or by some other person in his presence, and by his express direction, and attested and subscribed to in the presence of the testator by three or four credible witnesses, or else it shall be utterly void and of no effect. This clause is a literal transcript of the provision in the statute

Pocock v. Redinger.

of frauds and perjuries, 20 Charles II, chapter 8. Now what was the state of the law before this statute? In Wigram on Wills, page 5, author's edition, it is thus laid down: 'It was holden before the statute that parol evidence was, in certain cases, admissible to determine the person or thing intended, where the description in the instrument was insufficient for that purpose; as in a devise to A. B., where there were two persons of the same name, or a devise of the manor of Dale, where the testator had two manors of that name, North Dale and South Dale, in which cases parol evidence of witnesses who spoke to the testator's intention was admissible to determine which of the two persons named respectively A. B., or which of the manors of Dale was intended by the testator. That is to say where the identity of the person or thing intended by the testator has been the only point in dispute, and the description in the will has been insufficient to determine it.' And further down he says: 'The courts have uniformly professed to be governed by the admitted principle that the judgment of a court in expounding a will should be merely declaratory of what is in the instrument. This was the general rule at common law before the statute, and if the statute has not strengthened its obligations, it certainly has not relaxed them,' and as to the effect of the statute, the author states that it, 'by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his written will does not express, and in effect makes the writing the only legitimate evidence of the testator's intention. No will is within the statute but that which is in writing, which is as much as to say that all that is effectual to the purpose must be in writing, without it had been void by reason of the mistake both of the Christian and surname; but where is the distinction between a grant and a devise of land for the purpose under consideration?' This case was one where 'Gertrude Yardley' was held entitled to a legacy which was given by the will to 'Catherine Earnley.' Again on page 180 Wigram says: 'The decisions then in the excepted cases must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determined principle. They appear to be decisions in which the general principle has been sacrificed to meet the hardship of particular cases.' One of the principal cases involving the admission of parol testimony to explain what the testator meant, is the celebrated case of *Goblet v. Beechey*, 8 Sim. 24. It is well known that the origin of Mr. Wigram's book was in his criticisms on that case, where the master of the rolls allowed parol evidence to explain what was meant by a provision in the will. This ruling however was reversed by Lord Chancellor BROUGHAM. After the decision in *Goblet v. Beechey*, came the case of *Miller v. Traorres*, 8 Bing. In that case the testator devised in a particular way all his estates in the county of Limerick and the city of Limerick. It appeared that the testator possessed estates in the city of Limerick, but none in the county, but that he had large possessions in the county of Clare, and the offer was made to prove, that in the original draft of his will, the devise had been of all his lands in the county of Clare and the city of Limerick, and that by a blunder of the scrivener, the county of Limerick had been inserted for the county of Clare. This case was heard, on appeal, by Lord LYNCHBURST and Lord Chief Justice TINDAL, among other judges, and

their opinions were delivered at great length and after mature examination, and it was there held unanimously by the judges that such evidence was inadmissible. In 18 How. (see also 11 Whart.) in the case of *Watkins v. Allen*, this case of *Miller v. Travers* is adopted by the Supreme Court of the United States as expressing the correct position on the subject. The testator in the present case does not say that his property was in the city of Washington, and it cannot be doubted that parol evidence to that extent would be admissible by way of identifying the property named by him in the will, but the argument is that we can go further than this and correct the numbers as given for square and lot.

"Now the applicable cases seem to be confined to instances of what Lord BACON calls 'equivocation' in a will, recognizing the principle as laid down by him that parol evidence was admissible 'where the persons or things may be equally designated by the same description,' or where there is a description plain enough as to one part in the will and equivocal as to the other, the equivocal part may be rejected if enough remains to let us see what the testator really intended to express, or portions of the description may be rejected, provided there is something left certain, as if a man, on writing his will on the back of a deed, should say, 'I give the piece of land conveyed to me by the within deed containing one hundred acres, lying in the county of Dale,' etc., he may have number of acres wrong, he may have the county wrong, and he may have the position wrong, and the name may be incorrect, and yet such a devise may be sustained, because a sufficient description of the property intended is evinced by his declaration that it is the property conveyed by the deed that is pointed out in the will—in other words, one thing may be incorrect and be corrected by another, if there is any thing to correct it by. In the case of *Wilkins v. Allen*, 18 How. 285, the whole matter is decided on the strength of this English decision.

"Now applying these principles here, what can we do with the devise of this lot? The will says, 'lot 6, in square 403,' and it is said that ought to be read lot 8 in square 406. The first thing to do then is to strike out the number of the lot and then strike out the number of the square. What then remains? Nothing on earth but these 'improvements.' It is manifest that this will was not drawn by a lawyer; it jumbles 'improvements' and appurtenances together, and leaves out words of limitation, and makes other blunders all the way through, and to admit parol testimony to give effect to the blunders of this man is to do the very thing which the statute was designed to prevent. The recent important cases seem to be within the principle I have just enunciated. For instance, a New Hampshire case, where the property was described wrongly, but was identified as 'the piece I bought of A.;' a case reported in 2 Washington's Reports, where 'a lot on Fourth street in the occupation of A. and B.,' was held to pass a lot on Third street in the occupation of the persons named; a case in Indiana, where the north-east quarter of a township was devised and the north-west quarter was held to pass, the rest of the description being there sufficient; the case in 20 Missouri, on page 289, where the sections devised were right, but the township wrong, and the property was identified in the will by its accessibility to

Pocock v. Redinger.

to the 'Big spring;' the case of *Fitpatrick v. Fitpatrick*, in 86 Iowa, where the testatrix devised the west half of the north-east quarter, which she did not own, instead of the east half of the south-west quarter, which was her property, and where the plaintiff offered proof that a similar mistake to that insisted on in the case of *Müller v. Traverses* had occurred, and to prove by the scrivener that the description originally given to him was the correct one, but the offer of parol proof was rejected. In the case of *Wetheres's Lessee v. Bascoeville*, the circumstances were quite touching; a settler in the far west, killed by Indians, while dying had at the door of his cabin dictated his will to a neighbor; it happened possibly through want of familiarity with the subject, that the scrivener incorrectly recited the instructions of the testator, and this fact was so evident that the heirs for many years had held the property among themselves according to the verbal directions of the testator, and against the written devises in the will. When however a claim was made under the language of the will, the Supreme Court held that parol evidence of what the testator directed the scrivener to write was inadmissible and that the devises, as expressed in the will, were conclusive upon the rights of the parties. It results in the language of the court in the case of *Jackson v. Van Vachten*, 11 Johns. 301, that 'in cases of this kind, where there is no sufficient description in the will, independent of that which is false, the devise fails for uncertainty. It would be impossible for counsel ever to advise with confidence as to a title derived under a will, if as in the present instance, after the expiration of nearly fifty years, it is admissible by parol evidence to prove that a devise of property distinctly described in the will was in fact a devise of another portion not named in the will and differing in location and in all other points of description, and if under the sanction of this statute of frauds such evidence is to be admitted, we may well, in the language of an English judge, say that its title should be changed and that it should be called 'an act for the promotion of fraud and the encouragement of perjuries.'"

The chief justice dissented.

VOL. LVIII — 11

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

CITY OF ST. LOUIS V. ST. LOUIS RAILROAD COMPANY.

(89 Mo. 44.)

Constitutional law — municipal ordinance — regulation of railroads.

A city ordinance requiring street railway companies to report quarterly the number of passengers carried is valid.

THE opinion states the case. The plaintiff had judgment below.

Smith P. Galt, for appellant.

Leverett Bell, for respondent.

RAY, J. The defendant was prosecuted and fined \$500 before a police justice of the city of St. Louis for refusing to make to the city register the report required by section 11 of article 4, of chapter 31 of the revised ordinances of said city, approved March 29, 1881, which section is as follows:

“Section 11. It shall be the duty of each and all of the street railroad companies in the city of St. Louis to report under oath to the city register, between the first and fifteenth day of the months of July, October, January and April of each year, by the president, secretary or superintendent, the number of trips made and passengers carried over the road, of which the person making the report

City of St. Louis v. St. Louis Railroad Company.

is an officer, during the preceding three months ending on the last day of the months of June, September, December and March, and any failure to make the report required by this section shall subject the street railway company so offending to a fine of not less than \$500. It shall be the duty of the city register, if said reports show that any of said companies have carried an average of over eighteen persons per trip to each car since their last previous return, to report such company to any of the police justices, and such company shall be subject to a fine of not less than \$300 for the first offense, and a fine of not less than \$500 for each subsequent offense."

The case was appealed to the Court of Criminal Correction, where on January 27, 1883, on a trial anew, the defendant was discharged. After motion for a new trial overruled, plaintiff was allowed an appeal to the St. Louis Court of Appeals, where the judgment was reversed (14 Mo. App. 221), and an appeal prosecuted here by defendant.

The agreed statement of facts show that the books of the defendant contained the information necessary to enable it to make the required reports, but that it failed and omitted so to do, and the question is, whether the provision of the ordinance requiring said report is valid and effectual against defendant.

Defendant's counsel urge the objection that the second provision of said section is unreasonable and illegal as a regulation of defendant, and that the first and second provisions are so mutually connected with, and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the city council intended them as a whole and that therefore they cannot be divided, but must stand or fall together. Whilst this is a sound rule of interpretation or construction of statutes, we are not fully satisfied of its applicability to the section in question. It does not, we think, appear from the section itself, that the sole purpose of the first provision was to enforce the second, or that it never was intended for any other independent purpose. Provisions of like import and of larger scope are not uncommon, and exist without any other provision corresponding to the second provision of said section. They may be, we think, enacted upon other and distinct and independent considerations. Defendant was, it seems, organized under chapter 39, Revised Statutes, 1855, page 404, and associations thereby organized, were required, by section

City of St. Louis v. St. Louis Railroad Company.

39 thereof, to make annually, under oath, very elaborate and detailed reports of their business, including the items as to the number of trips made and passengers carried, required by the provision in question, to the secretary of State.

By the first section of the act, approved January, 16, 1860, the defendant was exempted from reporting to the secretary of State and required to report to the city comptroller. Section 3, of said last named act, authorized the city to make such municipal regulations concerning the defendant as the public interest and convenience may require, but prohibits a reduction in the rate of fare. The present charter of the city of St. Louis authorizes the municipal assembly by ordinance, "To determine all questions arising with reference to street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after their completion." Section 1, article 10, page 1616, 2 Revised Statutes of 1879.

In the case of *Railroad Co. v. Railroad Co.*, 72 Mo. 67, this court held that said act of January 16, 1860, was in force and unrepealed and this defendant entitled to its benefits. We see nothing inconsistent with said act in the provision of the ordinance in question requiring said reports, but on the contrary it is, we think, clearly within the grant of power conferred in said section 3, empowering the city of St. Louis to make such municipal regulations concerning the defendant as the public interests and convenience may require. Upon a careful examination of the well considered opinion of the Court of Appeals, touching the various questions raised and urged by counsel for appellant, in addition to what is here said, we see no reason to doubt the correctness of the conclusions reached by that court, and for these reasons its judgment is affirmed. In these views, Judges NORTON and BLACK concur; HENRY, C. J., concurs in the result; SHERWOOD, J., defining his own position separately.

HENRY, C. J., and SHERWOOD, J. We think that the intent of the ordinance in question to make the railroad companies furnish evidence against themselves to be used as evidence in prosecutions for violations of the ordinance as clear as if it had been expressed in the title or body of the act; and upon no principle can such legislation be upheld, except that announced in the *City of Kansas v.*

Dyer v. Wittler.

Clerk, 68 Mo. 588, in which it was held that the violation of a city ordinance is not a crime. In that case two judges dissented; and it is not so clear that the ordinance in question is valid upon any ground as to admit of no doubts. Says Mr. Wharton, in his work on Evidence: "A witness also will be relieved from answering a question, a reply to which might expose him to a forfeiture of his estate. Nor does it make a difference that the penalties in a penal prosecution are limited to a fine." 1 Whart. Ev., § 534. We express no decided opinion upon the question, but have such doubts of the correctness of the ruling of our associates that we cannot give it our hearty concurrence.

DYER v. WITTLER.

(68 Mo. 51.)

Marriage — right of action for possession of wife's lands.

At common law, the right of action for possession of the wife's lands does not accrue to the wife or her heirs until after the death of the husband and the cessation of his right of curtesy initiate or consummate.

EJECTMENT. The opinion states the case. The defendant had judgment below.

Thomas A. Russell and *E. P. Johnson*, for plaintiff in error.

D. Murphy, for defendants in error.

RAY, J. This is an action of ejectment for certain real estate in the city of St. Louis, described in the amended petition, upon which the case was tried. Suit was commenced in May, 1878. The defense is the statute of limitations of twenty-four years. Rev. Stat., § 3222. The reply is, that in the year 1838 the mother of the plaintiffs was the owner of the land in fee-simple, having inherited it from her father; that she was, at the time, the wife of Abner W. Dyer, their father; that there was issue born alive of the marriage in 1837; that their marital relation continued until 1869, when it was dissolved by the death of the mother; that the father survived and died in 1870; that the plaintiffs are the only surviving

issue of the marriage, and claim the premises as heirs of their said mother.

At the trial evidence was given tending to support this reply. The court, under appropriate evidence, in that behalf, offered by the defendants, gave the following declaration of law, which drove the plaintiffs to a nonsuit:

"The court, of its motion, declares the law to be, that if defendants, or those under whom they claim, entered upon a tract of land, embracing the premises described in the petition herein, in the year 1846, claiming to own said tract under and by virtue of a deed purporting to convey the same to them in fee, and in that year inclosed said tract with a fence, and improved and cultivated said tract, and occupied said tract (or the portion thereof described in the petition), so inclosed and improved continuously from that time, under such claim of title, up to the time of the death of Abner W. Dyer, on or about the 25th of June, 1870, and for three years next after his death, and before the original petition in this case was filed, the plaintiffs are not entitled to recover."

After an unsuccessful motion to set aside nonsuit, the plaintiffs took the case, by writ of error, to the St. Louis Court of Appeals, where the ruling and judgment of the Circuit Court was affirmed, from which the plaintiffs bring the case here by writ of error. From this record it appears that the plaintiffs claim the property in question as the heirs of their mother, who at and before 1846, when the adverse possession, under which the defendants claim, first commenced, was the owner in fee of said real estate, and a married woman, with issue born alive of that marriage; that the said marriage continued until 1869, when it was dissolved by the death of the mother; that the father survived the mother and died in 1870; and that this suit was commenced in 1878, and within ten years after the death of the father, but not until thirty-two years after said adverse possession had commenced, and thirty-one years after the date of the present statute of limitations of 1847, and more than three years after the death of their father. The defense is the twenty-four years' statute of limitation. Under this state of facts, the only question is, are the plaintiffs barred of their right of action under a proper construction of the statute of limitations of 1847, invoked by defendants, for their protection?

The first section of that act, now section 3219 of the Revised Statutes of 1879, on its face declares, in substance, that no action

Dyer v. Wittler.

for the recovery of lands, or the possession thereof, shall be commenced, had or maintained, by any person whatever, unless it appears that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims, was seised or possessed of the premises in question within ten years before the commencement of such action or suit. But it may be remarked, at the outset, that by common consent the proper construction of the statute is, that notwithstanding the sweeping language of the first section of the act no person is embraced in or contemplated by the first or any subsequent section of the statute, except such as have a present existing right to commence an action or make an entry. *Dyer v. Brannock*, 66 Mo. 422; s. c., 27 Am. Rep. 359; *Johns v. Fenton*, 88 Mo. 64; *Harris v. Ross*, 86 Mo. 89.

Section 4 (now section 3222, of the Revised Statutes, 1879) declares that: "If any person entitled to commence any action, in this article specified, or to make an entry, be at the time such right or title shall first descend or accrue, either within the age of twenty-one years, or insane, or imprisoned on any criminal charge, or in execution upon some conviction of a criminal offense for any time less than life, or a married woman, the time during which such disability shall continue shall not be deemed any portion of the time, in this article limited, for the commencement of such action, or make such entry; but such person may bring such action or make such entry after the time so limited, and within three years after such disability is removed; provided, that no such action shall be commenced, had or maintained, or entry made, by any person laboring under the disabilities specified in this section, after twenty-four years after the cause of such action or right of entry shall have accrued."

Section 3224, Revised Statutes 1879, reads that: "If any person entitled to commence such action or to make such entry, die during the continuance of any disability specified in section 3222, and no determination or judgment be had of the title, right of action to him accrued, his heirs, or any person claiming from, by or under him, may commence such action or make such entry after the time in this article limited for that purpose, and within three years after his death, but not after that period."

The question before us, it may be remarked, is determinable, of course, by the state of the common law, as it stood at that date, unaffected by subsequent statutes, limiting the common-law rights

of the husband in the fee-simple estates of the wife. The material and decisive question for determination in this case therefore is to whom, by the common law as it stood at that date, did the right of action or cause of entry accrue, by reason of the adverse possession or disseisin, under which the defendants claim title. The solution of that question depends upon another, to-wit, who under the law and the facts had, or was entitled to the seisin and possession of the premises when the adverse possession first commenced.

The Court of Appeals, in their opinion affirming the ruling and judgment of the Circuit Court (14 Mo. App. 52), held that the case was governed by that of *Valle v. Obenhouse*, 62 Mo. 81, as modified and explained by *Dyer v. Brannock*, 66 Mo. 391, 442; s. c., 27 Am. Rep. 359, adjudicating upon this very title. That case (*Valle v. Obenhouse, supra*) held that: "The husband is understood to be jointly seised of his wife's estate, and during the existence of coverture he is not tenant by the curtesy, but only seised by right of his wife, and if there be a disseisin it is of the joint estate, and they must jointly bring an action to recover the possession. Under this view of the title of husband and wife in the lands of the wife, the statute of limitations will begin to run from the date of the disseisin against both." If that ruling be accepted as the present state of the law in this State on this question, the plaintiffs are unquestionably barred. It has been something over ten years since that decision was rendered, and it has justly been esteemed an important one, and if during all that time its correctness has not been challenged, it should not now be lightly called in question. It becomes important therefore to consider, not only the case itself, but also how far, if at all, and to what extent it has since been questioned, modified or overruled.

In the first place it may be remarked that the opinion in that case was that of a majority of the court, one of its members being absent and another delivering a dissenting opinion to the effect: "That the wife had no right of action or entry after the disseisin until the death of the husband, and that her grantee, the plaintiff, in that event was not barred by the statute of limitations." It may also be added that one member of the majority placed his concurrence in that opinion on grounds somewhat different from those stated in the opinion proper. It may be further remarked that the case, when decided, was regarded by the court as a new one in

Dyer v. Wittler.

regard to the proper construction of our statute of limitations, and for that reason, as well as its own merits, was carefully considered by the several judges in their respective opinions. In that of the court proper, as well as that of the dissenting judge, the two "opposing theories" are elaborately discussed, and numerous authorities cited in support of the respective positions, so that but little, if any thing, remains to be said on the question itself beyond a few remarks, the citation perhaps of some additional authorities, and a consideration of subsequent decisions of this court, in which the question itself, or the legal propositions on which the question at issue rests, are stated and recognized with more or less distinctness, or else more elaborately considered, and in one case, at least, where the *Valle v. Obenhouse* case is directly questioned, and its construction of the statute of limitations, in this behalf, expressly challenged. The *Valle v. Obenhouse* case itself, in speaking of the effect of the tenancy by the curtesy of the husband upon the wife's seisin and possession of her fee-simple estate, concedes that "it is clear that if a wife has a mere reversion the statute does not bar her until her reversion vests by the death of her husband, since in such cases her right of action only commences on the termination of the particular estate." The court then remarks: "Where a particular estate has been created by the husband, whether with or without the consent of the wife, the wife, or her heirs, cannot sue until its determination." The error in this is that the creation of the particular estate is the act of the marital law, and not of the husband's deed; the latter simply transfers what the former creates. Under the facts and authorities, the seisin and possession of the wife by operation of the marital law is transferred to the husband during his life, consequently no right of action accrues to her or her heirs until his death, and in such case the wife is not within the purview of either the ten or twenty-four year provisions of section 3222, since she is not, in the language of that section, entitled to commence an action or make an entry. In such case, no cause of action whatever accrues to the wife, until the husband's death. The question of the right of action depends upon the fact and right of seisin or possession. Whoever is entitled, under the law, to the possession, "*ex necessitate*," is entitled to the right of action. As was well said in the dissenting opinion in the *Valle v. Obenhouse* case, *supra*, the statute of limitations (section 3222) does not under-

take to determine who is or who is not entitled to commence an action or make an entry, but simply provides within what period such person so entitled shall commence their action or make their entry. The question is determinable solely by the common law applicable to the facts of the case.

It may be conceded also, as claimed in the concurring opinion in that case, that the statute was designed to operate with uniformity and exclude all alike, whether infants, *feme covert*s, insane persons, etc., after the lapse of twenty-four years from the date when the right or title contemplated shall have first accrued. "If (as elsewhere said, in said concurring opinion, in speaking of the right of action) it has descended or accrued, then by the express proviso of the statute, twenty-four years, even in the case of a married woman, makes a complete bar." But the question remains, has the right in question, under the law and the fact, so accrued? If it has, it is unquestionably barred. But otherwise, not. It is true that infants, insane persons, prisoners, and married women, are all grouped together in section 3222, and are all to be treated alike, as barred by its provisions whenever they are alike entitled to sue, but only when so entitled. There is a marked difference in the effect, which the several disabilities therein mentioned have upon the subjects thereof, at least so far as the married woman is concerned. It must be remembered that as to infants, insane persons and prisoners, their several disabilities have no effect to displace or suspend their seisin or possession of their real estate. Not so in the case of a married woman. Her disability of coverture, by its own force, under the marital law, operates to transfer her seisin and possession of her fee-simple estate to her husband, and with it the consequent right of action. This important difference, so far as a right of action incident to a disseisin is concerned, seems to have been overlooked, both in the opinion of the court and that of the concurring opinion.

But passing from that decision, the next case in which this question came before the court is that of *Dyer v. Brannock*, 66 Mo. 420-423, and especially 422; s. c., 27 Am. Rep. 359, which appears to be an adjudication upon this very title involved in this case. 14 Mo. App. 54; 2 Mo. App. 432. The opinion in this case, as I understand it, seriously impairs, if it does not virtually overrule that in *Valle v. Obenhouse*. While it in terms evidently recognizes the ruling in that case, yet it states with much distinctness and clear-

Dyer v. Wittler.

ness, and with apparent approval, the general leading legal propositions announced as the basis of the dissenting opinion in that case. It appears to me difficult, if not impossible, to reconcile the two cases. It is there stated that "it is generally understood that the statute of limitations does not run against any one who has no right of possession." It is there also said, speaking of the husband, that "so long as he lived, his life tenancy, whether outstanding in a third person or remaining in him, effectually prevents any action or entry by his heirs." It is there further said, "this would be the result, whether the husband, during the life of the wife, had transferred his estate to some third person by deed, or it has passed to an adverse possessor." It is also there said in speaking of the instruction of the trial court in that case, that: "The objection to this instruction is, that the tenancy by the curtesy of A. W. Dyer, consummate on the death of his wife, is entirely overlooked. Mrs. Dyer died in 1869, before the bar of twenty-four years had elapsed. Her estate, not having been barred by the statute of limitations, on her death passed to her heirs. Her heirs however could not sue on her death, because her husband survived her, and they had no right of entry or action during his life estate. If the statute of limitations is construed to run against them from the death of the mother, it operated against parties who had no right of action, and who would have been trespassers had they undertaken to enter. Indeed, upon this construction of our statute, had the husband lived three years or more after the death of the wife, the title of the heirs would be wholly destroyed, since they cannot sue during the continuance of the particular estate, and before its determination, the three years from the death of the mother have gone by." It is also stated in said opinion, that: "The person barred by the statute is one whose right of entry has accrued, and who neglects to sue during the three years allowed after his right of action accrues." The opinion then winds up with this remark: "Whether in the event the suit had not been brought within three years after the death of the husband, the heirs would have been barred by an adverse possession of ten or thirteen years, as was held by the Court of Appeals, is of no practical importance in the case. It is unnecessary to give an opinion on this question until such a case arises." And just that identical case has arisen on this record and upon the same title, and we are now called on to decide what was there waived.

In the case of *Kanaga v. Railroad*, 76 Mo. 214, the court states the common-law rights of the husband in the wife's fee-simple lands, in the following pointed language: "The husband, during the marriage, has the exclusive right to the possession of her real estate not held to her sole and separate use, and is the only proper party plaintiff in a suit to recover possession thereof." If this be true, the ruling in *Valle v. Obenhouse*, *supra*, cannot be correct. In the still later case of *Gray v. Dryden*, 70 Mo. 106, MARTIN, C., uses this equally pointed language: "This was an action for an injury to the actual possession of real estate. The possession of the wife was the possession of the husband. I do not well see how their possession can be joint or common under our law. Certainly this is not so in respect to her general real estate, which is placed by the law in the exclusive possession of her husband. Where he is in possession of it, the fact that she is on it with him gives her no possession any more than to any other member of his family whose actions are subject to his control. She is not in joint possession with him because she is there, and she is not a necessary party to any suit to vindicate the possession against trespassers and wrong-doers." In a still later case, that of *Mueller v. Kaessman*, 84 Mo. 318, 324, 330, it was held that "in this State a wife is not a necessary party to an action of ejectment by the husband for her lands." The leading question however in that case was as to how far and to what extent the common-law rights of the husband in the real estate of the wife was changed, modified or abolished by section 3295, Revised Statutes, 1879, first enacted in 1863. In the discussion of that question the common-law rights of the husband, anterior to that statute, are stated at page 324 in the following language: "What were the rights of the husband at common law in the land of the wife? These: He was jointly seised with her of that land; had, *jure uxoris*, the exclusive right to the possession of that land, its rents and profits; could make a tenant to the *præcipe*; could lease or mortgage by his own deed alone, or by his deed without joining his wife with him; convey his marital interest in the land, which conveyance would be good during their joint lives, and his freehold estate might be seised and sold on execution." At page 330, this further language is used: "At common law it was necessary for the husband to join the wife with him in an action to recover the real estate of the wife. * * * And if the common-law rule has not been abrogated by our Code, it

Dyer v. Wittler.

would seem that she must be joined. It has however been otherwise decided in this State, the husband being regarded as the only necessary party plaintiff in actions for the recovery of her lands." Citing *Gray v. Dryden*, 79 Mo. 106; *Cooper v. Ord*, 60 Mo. 420, and cases cited.

This case, also says the *Kanaga* case, 76 Mo. 214, "in so far as it conflicts with the views herein expressed, should be no longer adhered to." But this, as I understand the case, does not affect or overrule any thing therein said as to the common-law rights of husband and wife, anterior to the enactment of the statute (section 3295) limiting such rights, but only his rights to his wife's land, since the passage of the statute under construction. In a still later case, that of *Harris v. Ross*, 96 Mo. 89, this language is used: "It is of the essence of the statute of limitations not to run against a party until a right of action has accrued to such party. The statute, strictly speaking, it must be remembered, whether expressly or by analogy, deals only with the right of action, and when there is no such right there can be no bar. In such case there is nothing for the statute to operate upon or to set the same in motion. * * * Section 3222 of the statute of limitations, by its terms, deals only with persons entitled to commence an action or make an entry, and section 3224, of same act, has no application to the heir of a person not thus entitled."

In the late case of *Campbell v. Laclede Gas Co.*, 84 Mo. 352, at pages 376-7, the commissioner, after showing that the plaintiffs were clearly barred by the ten-year statute of limitations, adds this further paragraph: "Under the rule approved in *Valle v. Obenhause*, 62 Mo. 81, the plaintiffs would be barred by the absolute limitation of twenty-four years, which runs through all these disabilities, excepting only the suspension of the right to sue, by reason of an existing tenancy by curtesy." This at least is a recognition by the commissioner who wrote that opinion of the rule laid down in *Valle v. Obenhause*. The authority of that case, so far as this one is concerned, however, may well be questioned for two reasons: 1. As it appears that the plaintiffs were clearly barred by the ten-year law, it would seem that there was nothing left for the twenty-four year proviso to operate on, and its potency was not at all needed, as it only operates when the ten-year law fails to destroy plaintiff's title. 2. As it appears that the disability under which the parties labored, through whom the plaintiffs claim, at the time

the adverse possession was first taken, was that of infancy, and not coverture, as in the case at bar, their subsequent disability of coverture would afford no protection, as cumulative disabilities are not allowed. But be this as it may, the commissioner evidently recognized the authority of that case. To this opinion of the commissioner there is a concurring opinion of a member of the court, concurred in by three others of the judges, to the effect that "while he concurred in holding the plaintiffs to be barred, it was not upon the authority of that case; and he desired to add to what he had heretofore said in his dissenting opinion (62 Mo. 90), that a statute which deprives a married woman of her property for failure to sue for it in twenty-four years, when during all that time she had no right to the possession, and could not therefore maintain an action for such possession, was in his opinion plainly unconstitutional. The construction given to the statute by a majority of the court in that case (62 Mo.) could not therefore be the correct one." This concurring opinion is at least a declaration to the effect that the rule laid down in that case is not the law. It is however proper to say of this concurring opinion, as was said of the opinion of the commissioner, that its authority also may be equally questioned for the same reasons.

The last case in which reference is made to the ruling in *Valle v. Obenhouse*, 62 Mo. 81, is that of *Johns v. Fenton*, 88 Mo. 64, which was a suit by the wife and her second husband for the admeasurement of dower in the real estate of her first husband. The doctrine of that case, as I understand it, in treating of the scope and operation of the statute of limitations, is to the effect that "The right limited is a present existing right of action or of entry; that the wife's right to dower is not of that sort, and for that reason not barred by the statute, and that it is obvious that cases like *Valle v. Obenhouse*, 62 Mo. 81, can have no application to such a case." This manifestly is the correct doctrine. The court there speaking of the assignment of dower, holds that the statute begins to run from the period of its assignment, and if assigned before her second marriage, her right of action would be barred in ten years. If after that marriage, then by the period of twenty-four years, citing *Valle v. Obenhouse*. Conceding without admitting, that that might be true; yet it is obvious that such a case is not in point, and would be no authority in support of the ruling in *Valle v. Obenhouse*, for the reason, if no other, that the wife's real

estate in the case supposed is not an estate of inheritance to which the husband's tenancy by the curtesy could attach or interpose, as in that case and the one at bar. This case therefore has no application, and is not an authority in the case at bar.

The law on the question at issue is well stated in strong and pointed language in Sedgwick and Wait on Trial of Title to Land, at page 117 and 118, section 219, where it is said: "A tenant by the curtesy initiate may sue alone for the possession of his wife's land, and for damages for withholding it. * * * At common law the husband's interest in the estates of which the wife was possessed at the time of the marriage was a freehold, he alone having the right of entry and the present right of exclusive enjoyment. The wife could not recover the lands from a stranger, even though her husband was joined as defendant, and disclaimed title, and admitted the wife's right to possession." To the same effect also is the case of *Clark v. Clark*, 20 Ohio St. 128, where it is said that during coverture the right of possession of the wife's fee-simple lands is in the husband, and the wife cannot maintain an action to recover the same from a stranger. *Wilson v. Arentz*, 70 N. C. 670, is also a case in point. In that State it seems they have a statute substantially like section 3895, Revised Statutes 1879, and it was there held that, "A tenant by the curtesy initiate has a right to sue alone for the possession of his wife's land, and for damages for the detention of it, * * * and the fact that the act of 1848 (Battle's Rev., ch. 69, § 33) deprives him of the power to lease the land, without the consent of his wife, will not prevent his recovery of the land by an action, under C. C. P. without joining his wife as a party."

To the same effect are the cases of *Bledsoe v. Sims*, 53 Mo. 305; and *Kanaga v. Railroad*, 76 Mo. 207; *Cooper v. Ord*, 60 Mo. 421, 430. In the North Carolina case of *Wilson v. Arentz*, *supra*, it is said that "For an injury done to the inheritance his wife must have joined in the suit, for a trespass to the possession he could sue alone." This, I apprehend, is the true criterion for determining when the wife is, or not, a necessary or proper party to a suit, affecting the wife's fee-simple lands.

The objection, that the construction here given section 3222 of the statute of limitations, renders the same nugatory and senseless, so far as a married woman is concerned, is not, we think, well taken. A married woman during coverture may have a right of

action for an injury done to the inheritance or integrity of her fee-simple lands, or to the possession of her sole and separate estate in lands to which the husband's marital rights are excluded, just as any other person, and these rights of actions of hers, and others of a like character, are just as much within the operation of that section as any other of the parties therein named. Whenever and wherever she has a right of action during coverture, she is as fully within the operation of that section, twenty-four years and all, as any other party therein mentioned, and equally barred whenever they are barred. This objection therefore is without force or merit, and is fully met and refuted in the dissenting opinion of Judge HOUGH in the case of *Valle v. Obenhouse*, 62 Mo. 81, and the argument need not be here re-stated.

The contention and point in judgment in this case is that the wife, during coverture by reason of the husband's curtesy initiate, had no right of action, and that after her death her heir had none by reason of the husband's curtesy consummate, prior to his death, and for these reasons the plaintiffs are not barred by the statute of limitations. Adopting the views expressed in the dissenting opinion of Judge HOUGH in the case of *Valle v. Obenhouse*, 62 Mo. 81, and of the authorities there cited, as well as in consideration of the views expressed in the subsequent decisions of this court heretofore mentioned, and the additional comments, reasons and authorities herein given and cited, we hold that the ruling of the court in that case is not the correct one, and its authority in that particular is hereby overruled.

This leads to the conclusion, that upon the facts of this case, the plaintiffs herein are not barred of their right of action, and for these reasons the judgment of the St. Louis Court of Appeals is reversed, and the cause remanded for further proceeding in conformity to the views here expressed.

All concur, except SHERWOOD, J., who dissents.

CLIFTON v. HOWARD.

(80 Mo. 192.)

Partnership — participation in profit and loss.

▲ mere participation in profit and loss does not necessarily constitute a partnership, as to antecedent creditors, but the parties must have an interest also in the property which is the subject of the business association. (*See note, p. 99.*)

REPLEVIN. The opinion states the case.

A. W. Anthony and Cosgrove, Johnston & Pigott, for plaintiff in error.

R. F. Walker and Draffen & Williams, for defendant in error.

HENRY, C. J. This is an action of replevin to recover of defendant thirty-two head of fat cattle taken by him as the property of James K. Estis on an execution against Estis in favor of B. S. Walker. The defense was that plaintiff in this case and Estis had fraudulently conspired to cheat and defraud the creditors of Estis, who was in fact the owner of the property, and that Clifton's claim was made in furtherance of said fraudulent scheme.

The evidence tended to prove that plaintiffs, Clifton, and Estis, both residents of Morgan county, had for years been purchasing and shipping cattle to St. Louis, each on his account and to different commission houses, Clifton to Irons & Cassidy, and Estis to Geo. R. Taylor & Company. That neither was using his own capital. That they severally had an agreement with their respective commission merchants, by which he was to purchase cattle for his commission merchant and when the cattle were delivered in the stock yards at Versailles and billed for shipment in the cars, he could draw a sight draft on his commission merchant for the amount paid for the cattle, he having previously paid for them by his individual checks on banks at Versailles. That when the cattle in controversy were levied upon in the stock yards at Versailles they had been billed by Clifton to Irons & Cassidy, and Clifton had drawn a sight draft on them in favor of a bank at Versailles for the amount necessary to cover his checks on said bank to pay for

the cattle. That said cattle were purchased by Clifton and paid for by his individual check on said bank, and that Estis had no interest in said cattle, except under the following arrangement made by and between him and Clifton, about two years before this bunch of cattle was purchased, viz.: In order to avoid conflict and rivalry between them in the cattle trade in that neighborhood, it was agreed that in all lots of cattle bought in the same neighborhood, and shipped by either, the other should have half the profits, if any, arising from the shipment and should pay half the losses of such shipment and sale, if any, and in pursuance of said arrangement they often assisted each other in loading stock on the cars, and accompanied each other in purchasing, and when a portion of the cattle in controversy were purchased, Estis was present, and was also present when the cattle were seized by Howard, the sheriff. That when either went out of his own neighborhood and bought cattle, it was on his own account, and the other did not share in the profits of such purchases. That between the time these cattle were levied upon, and the date at which they were replevied and shipped, cattle declined in St. Louis forty or fifty cents on the one hundred pounds. The demand of Walker against Estis was the individual debt of Estis, with which plaintiff had no connection whatever, and was contracted long before Clifton and Estis had any business connection with each other.

[Omitting instructions.]

The court tried the cause upon the theory, as indicated by the instructions given at defendant's instance, and refused instructions of plaintiff, that a mere participation in the profits and loss of the venture by one who had no other interest in the property was sufficient to constitute him a copartner of the other party in the property itself. This question was elaborately considered in the opinion of this court delivered by Napton, J., in the case of *Donnell v. Harsh*, 67 Mo. 170, and the conclusion announced was that "a mere participation in profit and loss does not necessarily constitute a partnership." This case was followed in that of *Musser v. Brink*, 68 Mo. 242, and again in the same case reported in 80 Mo. 350; *Rapp v. Vogel*, 45 Mo. 524, is to the same effect.

Alfaro v. De La Torre, decided by the English High Court of Chancery, a brief synopsis of which decision will be found in 3 Cent. L. J. 473, seems to be directly in point on the question, and in harmony with what this court held in the cases, *supra*.

Clifton v. Howard.

In Story Part., § 27, the learned author says: "And accordingly it has been held, at the common law, that if A. is owner of goods, and agrees with B. that B. shall be interested in a particular portion of the profit and loss of the adventure, or voyage abroad in which the goods are to be embarked, such an agreement will not alone make A. and B. partners in the goods, as between themselves, but only partners in the profits." As to persons who have dealt with them as partners this question would be presented. It is not however in this record, because the debt for which the cattle were seized was contracted by Estis, on his own account, long before he and this plaintiff had formed any business connection. As to such a creditor, his debtor must have an interest not only in the profits and losses; but also in the property, the subject of the speculation. In *Alfaro v. De La Torre, supra*, the ruling seems to have been, that an agreement between two persons to divide the profit or loss upon a sale of goods, which are to be and paid for by one of them, does not create a joint property in the goods.

The judgment is reversed and the cause remanded.

All concur.

Judgment reversed.

NOTE BY THE REPORTER.— See *Thayer v. Augustine*, 55 Mich. 187; *Parson v. Anderson*, 5 Mont. 488; s. c., 51 Am. Rep. 65; *Sodiker v. Applegate*, 24 W. Va. 411; s. c., 49 Am. Rep. 252, and note, 255; note, 82 Am. Rep. 271.

Participation in profits.— It was laid down in *Grace v. Smith*, 2 W. Bl. 998, and *Wagh v. Horner*, 2 H. Bl. 247, that mere participation in the profits of a business renders the recipient liable as partner to creditors, even though no partnership exists between the parties.

DE GREY, J., remarks in *Grace v. Smith* that "every man who has a share of the profits of a trade ought also to bear his share of the loss, because he (the sharer in profits) takes a part of that fund on which the creditor of the trader relies for payment."

The rule enunciated in *Grace v. Smith* continued to be the law in England till 1860, when the House of Lords overruled it in *Cox v. Hickman*, 8 H. L. C. 268. The doctrine laid down in this case has been uniformly followed by the English courts. *Bullen v. Sharp*, L. R., 1 C. P. 86; *Holme v. Hammond*, L. R., 7 Exch. 218; *Mohoo v. Court of Wards*, L. R., 4 P. C. 419; *Ex parte Tennant*, L. R., 6 Ch. Div. 308; *Kelly v. Scotto*, 49 L. J. Ch. (N. S.) 863; s. c., 43 L. C. (N. S.) 327; *Gilpin v. Anderby*, 5 B. & Ald. 594.

The purport of the opinions delivered in *Cox v. Hickman* in the House of Lords is very clearly and succinctly stated in *Holme v. Hammond, supra*: "The principle to be collected from them appears to be that partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of the business, but that the

existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal, and each an agent for the others."

BLACKBURN, J., in *Bullen v. Sharp*, *supra*, in referring to *Cox v. Hickman*, says: "I think that the *ratio decidendi* is that the proposition laid down in *Waugh v. Career*, viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord CRANWORTH, whether the trade is carried on on behalf of the person sought to be charged as partner, the participation in the profits being a most important element in determining the question, but not being in itself decisive; the test being in the language of Lord WENSLEYDALE whether it is such a participation in the profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."

The case of *Molwoo v. Court of Wards*, *supra*, was a case of a loan of money for which the borrower was to pay a share of the profits of the business in which the money was to be used. The borrower agreed with the lender to allow him to control the business in several important particulars; and yet it was held that the lender was not thereby rendered liable to creditors as partner. Baron BRAMWELL, in *Bullen v. Sharp*, characterized the rule of *Graves v. Smith* as one which had "caused more injustice and mischief than any bad law in our books," and also: "They say that the defendant is a partner with his son, and that if not partners *inter se*, they are so as regards third parties. A most remarkable expression. Partnership means a certain relation between two parties. How then can it be correct to say that A. and B. are not in partnership as between themselves; they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? A. is not the agent of B. B. has never held him out as such; yet C. is entitled as between himself and B. to say that A. is the agent of B. Why is he so entitled if the fact is not so, and B. has not so represented?"

Under these authorities it is clear that the question of liability to creditors in England depends entirely upon the existence of a partnership *inter se*. If a partnership has been established between the parties, of course all the partners are responsible for firm debts; but no one can be charged as a partner who is not a partner in fact, unless he has by his acts or declarations estopped himself from claiming that he is not a partner.

There are therefore only two grounds of liability to creditors: The party sought to be charged as partner either must be a partner in fact or he must have estopped himself from denying the existence of a partnership relation between himself and another.

Mr. Lindley, after reviewing the English cases, comes to this conclusion: "In fact the strong tendency of the above decisions is to establish the doctrine that no person who does not hold himself out as partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*; and it is perhaps not going too far to say that this is now the law." 1 Lind. on Part. 42. This was the rule of the Roman law, and is

Clifton v. Howard.

the doctrine of the modern foreign law throughout Europe. That the courts of this country have always felt the rule enunciated in *Grace v. Smith* to be unsound and unjust is manifested by the numerous exceptions to the rule which would have been established in cases in which the rule could have been applied as reasonably as in any case in which it has been applied.

Participation in profits for services.— One exception is in favor of servants and employees. The courts have uniformly held that an agreement to receive a certain percentage of profits as compensation for services does not render the participant in profits liable to the creditors of his principal or master. *Bradley v. White*, 10 Metc. 308; s. c., 43 Am. Dec. 435; *Deming v. Cabbott*, 6 Metc. 82; *Richardson v. Hughitt*, 76 N. Y. 55; s. c., 32 Am. Rep. 267; *Buckle v. Eckhardt*, 1 Den. 341; s. c., 8 N. Y. 182; *Loomis v. Marshall*, 12 Conn. 69; s. c., 30 Am. Dec. 596; *Nicholas v. Thielges*, 50 Wis. 491; *Smith v. Bodine*, 74 N. Y. 30; *Lewis v. Greicher*, 51 N. Y. 231; *Ambler v. Bradley*, 6 Vt. 119; *Hanna v. Flint*, 14 Cal. 73; *Barber v. Casalis*, 30 Cal. 92; *Higgins v. Graham*, 51 Mo. 17; *Edward v. Tracy*, 62 Penn. St. 374; *Pond v. Cummins*, 50 Conn. 372; *Cothran v. Marmaduke*, 60 Tex. 370; *Nicholaus v. Thielges*, 50 Wis. 491; *Holbrook v. Oberne*, 56 Iowa, 324; *LeFevre v. Casagnio*, 5 Colo. 564; *Walker v. Hirsch*, 51 L. T. Rep. (N. S.) 481, and cases cited in note 1, p. 20, vol. 1, Lind. on Part.

Participation in profits for rent.— Another exception to the rule is that a lease of a farm on shares, or of any property on condition that the lessee is to pay as rent a certain share of profits, will not impose upon the lessor the liability of a partner. *McDonnell v. Battle House Co.*, 87 Ala. 90; s. c., 42 Am. Rep. 99; *Beecher v. Bush*, 45 Mich. 188; s. c., 40 Am. Rep. 465; *Brown v. Jaquette*, 94 Penn. St. 118; s. c., 39 Am. Rep. 770; *Putnam v. Wise*, 1 Hill, 234; *Christian v. Crocker*, 25 Ark. 327; *Holmes v. Old Colony R. Co.*, 5 Gray, 58; *Donnell v. Harsh*, 67 Mo. 242; *Dwinell v. Stone*, 30 Me. 384; *Jeter v. Penn*, 28 La. Ann. 230; s. c., 26 Am. Rep. 98; *Taylor v. Bush*, 75 Ala. 432; *Gardenshire v. Smith*, 39 Ark. 290; *Clark v. Smith*, 53 Vt. 529; *Day v. Stevens*, 88 N. C. 83; s. c., 43 Am. Rep. 732. But see *Reynolds v. Pool*, 84 N. C. 87; s. c., 37 Am. Rep. 607.

Numerous other authorities might be cited, but these are sufficient, as the point is well settled. This doctrine of non-liability applies in all cases in which the party sought to be charged as partner has received, or is to receive a share of profits as compensation for services performed or for the use of property furnished. Story on Part., §§ 41-48; 3 Kent Com. 33.

Participation in profits for use of money.— There has been frequently before the courts of this country the question whether an agreement to receive a certain portion of profits as compensation for the use of money loaned will render the participant in profits who merely lends his money liable as partner to creditors. The decided weight of authority is against the liability. *Williams v. South*, 7 Iowa, 434; *Hart v. Kelly*, 83 Penn. St. 286; *Smith v. Knight*, 71 Ill. 148; s. c., 23 Am. Rep. 94; *Harvey v. Childs*, 28 Ohio St. 319; s. c., 23 Am. Rep. 387; *Eastman v. Clark*, 53 N. H. 276; s. c., 16 Am. Rep. 192; *Eagar v. Oranford*, 76 N. Y. 97; *Richardson v. Hughitt*, 76 N. Y. 55; s. c., 32 Am. Rep. 267; *Curry v. Fowler*, 87 N. Y. 33; s. c., 41 Am. Rep. 348; *Boston & Col.*

Smelt. Co. v. Smith, 18 R. I. 27; s. c., 43 Am. Rep. 3; *In re Francis*, 2 Sawy. 286; *Polk v. Buchanan*, 5 Sneed, 731; *Gideon v. Stone*, 43 Barb. 285; s. c., 28 How. Pr. 468; *Lord v. Proctor*, 7 Phila. 630; *Campbell v. Dent*, 54 Mo. 325; *Eager v. Crawford*, 76 N. Y. 97; *Culley v. Edwards*, 44 Ark. 433; s. c., 51 Am. Rep. 614; *Slade v. Paschal*, 67 Ga. 521; *Benedict v. Heterick*, 35 Supr. Ct. (N. Y.) 403.

In *Curry v. Fowler*, 87 N. Y. 83, the court say: "In *Richardson v. Hughitt*, 76 N. Y. 55, it was held by this court that a person who has no interest in the business of a firm or in the capital invested, save that he is to receive a share of the profits as compensation for services or for money loaned for the benefit of the business, is not a partner, and cannot be held liable as such by a creditor of the firm. The case cited is very similar in its leading aspect to the one at bar." The question was directly involved. Fowler, who was sought to be charged as partner, had loaned \$50,000 to certain owners of real estate to enable them to erect certain buildings thereon. Fowler was to receive as compensation for the use of his money interest thereon and one-half of the profits arising on a sale. The claim was for work performed and materials furnished in the erection of these buildings. Held, that Fowler was not liable as partner.

In *Boston and Colorado Smelting Co. v. Smith*, 18 R. I. 27; s. c., 43 Am. Rep. 3, it was held: "An agreement to lend money and indorse to a certain amount for the purposes of the borrower's business, in consideration of a certain percentage of the net profits of that business, does not constitute the parties partners as between themselves or as to third parties."

There are some authorities which apparently militate against this doctrine; but a careful analysis of them will show that they are only apparently and not really opposed to it. *Parker v. Canfield*, 37 Conn. 250; s. c., 9 Am. Rep. 317; *Leggett v. Hyde*, 58 N. Y. 272; s. c., 17 Am. Rep. 244; *Wood v. Mallett*, 7 Ohio St. 172; *Mason v. Partridge*, 66 N. Y. 633; *Rosenfeld v. Haight*, 53 Wis. 260; s. c., 40 Am. Rep. 770; *Sheridan v. Medina*, 10 N. J. L. 469.

Mason v. Partridge is not in point, for it appears in that case that the parties had endeavored by agreement to restrict the liabilities of Partridge, who was sought to be charged as partner to the sum of \$2,000. There was therefore an actual partnership between the parties, and of course Partridge was liable, because the common law recognized no special or limited partnership, and his attempt to restrict his liability as partner was therefore futile.

In *Rosenfeld v. Haight* the court based its decision that Haight, whom creditors were seeking to charge as partner, was liable as such, on the ground that he was to receive three-fifths of the profits, not as compensation for the use of his money, but as a party interested as principal in the business. In other words the court held that the agreement made Haight a partner in fact for all purposes, because he was actually interested in the management and prosecution of the business. At page 266 the court say: "But it is said in answer to this view that the intention of the parties was, that Haight should receive three-fifths of the profits as a mode of compensation for the use of his money, but that he was not to participate in the profits as such. On looking at the different clauses of the agreement, it is very clear to our minds that this construction is not correct." The court expressly recognized the soundness of the

Clifton v. Howard.

doctrine that there is no liability as partner when there is a mere participation in profits as compensation for the use of money by distinguishing the case at bar, from *Richardson v. Hughitt*, 76 N. Y. 55, in which that doctrine was enunciated: "The case of *Richardson v. Hughitt* is much more similar to the one at bar, but still that is distinguishable. The court construed the agreement in that case as amounting to a contract for a loan, and the provision as to profits being intended merely as a mode of providing compensation to the lender for the use of his money advanced." The lender there received the share of the profits not as a partner but on account of the debt owing to him by the firm, the court holding that he was only interested in the profits of the business as a measure of compensation for the use of his money.

Leggett v. Hyde, *supra*, has been practically overruled by the Court of Appeals in *Richardson v. Hughitt* and *Curry v. Fowler*, *supra*. In *Richardson v. Hughitt* the court attempted to distinguish *Leggett v. Hyde* from the case at bar, and based that distinction upon the statement that in *Leggett v. Hyde* the "money was advanced with a view to a partnership and for the benefit of Hyde himself."

Wood v. Mallett, 7 Ohio St. 172, so far as it can be construed as sustaining the principle that mere participation in profits as compensation for a loan creates a liability as partner, has been overruled by the case of *Harvey v. Childs*, 26 Ohio St. 319; s. c., 22 Am. Rep. 387. The plaintiff sought to recover of the defendant the value of certain hogs sold by plaintiff to one Potter, on the ground that defendant was Potter's partner. The following are the facts on which it was claimed that defendant was liable to the plaintiff as partner: Potter went to defendant and told him that he had contracted for about two car loads of hogs to be delivered the next day at Loudonville, and that he had no money to pay for them. He requested defendant to advance the money and take an interest in the hogs, but defendant refused to do so. Potter then proposed that if defendant would let him have the money to enable him to pay for the hogs he had bought and others he might have to buy to make the two car loads, defendant should take possession of the hogs when carried to Loudonville as security for the money; take them to Pittsburgh; sell them and take his pay from the proceeds of the sale; that he might have one-half of the net profits, and that in no event should he sustain any loss, but that Potter should pay the money advanced by defendant in case the amount realized from the sale of the hogs should be insufficient. The defendant accepted the proposition and advanced Potter \$2,500. Afterward Potter, without the knowledge of defendant, bought of plaintiff the hogs, the value of which the plaintiff sought to recover from defendant in this case. These hogs formed part of the two car loads which were sold by defendant in Pittsburgh. The proceeds of the sale were not sufficient to pay defendant the money loaned, and Potter paid him the balance. The court held that defendant was not liable as partner. The case is a very strong one, for the reason that there not only was an agreement to share profits, but the defendant was authorized to and actually did take possession of and sell the property.

The only remaining authority which would seem to sanction the early doctrine of liability from mere participation in profits as compensation for a loan

is *Parker v. Canfield*, 37 Conn. 250; s. c., 9 Am. Rep. 317. That case on a careful examination will appear to sustain no such rule. It is apparent from the facts of the case that it was the intention of the parties that a partnership should exist between the parties, and that the device of a loan was resorted to under advice of counsel, in order that certain of the partners might escape liability as such. This appears from the statement of facts in the opinion of the court, which is as follows: "In January, 1866, counsel was applied to to draw the papers, and the parties then learned that their agreement would make them partners. Thereupon it was agreed upon by the defendants that the money invested by Canfield and Hutchinson (who were sought to be charged as partners) should be regarded as a loan, and the attorney was requested to prepare a writing which should secure to them one-third of the profits without subjecting them to liability as partners." The debts on which Canfield and Hutchinson were held liable as partners were contracted after the agreement was attempted to be changed into a loan. Now it is clear that they were both partners in fact prior to that time. The court so expressly held.

"The defendants, while acting under their verbal agreement, were clearly partners both *inter se* and as to third parties." There was nothing in the modification of the agreement which indicated that the relation was to be changed. Canfield and Hutchinson were to lose no right to exercise the same control over the business which they could exercise before as partners. The only purport of that modification was that for the purpose of shielding them from liability, their investment in the business should be "regarded as a loan." They were therefore still partners, and their attempt to restrict their liability of course afforded them no exemption from partnership responsibilities. While the court referred with approval to the doctrine of *Grace v. Smith*, yet what was said on the subject was mere *obiter*, as the court based its decision on the ground that the two defendants, Canfield and Hutchinson, were parties in fact as well after as before the modification of the original agreement. The court say: "The business is one in which the defendants are all interested. The defendants are all principals. Andrews, as their agent, is using funds furnished by them all in a manner agreed upon by them all for their joint benefit and profits."

These are all the American cases which appear to give any countenance to the notion that participation in profits as compensation for a loan renders the recipient liable as partner. We will now advert to the English authorities. The case of *Mohoo v. Court of Wards*, L. R., 4 P. C. 419, has been referred to already. In that case the person whom the creditors attempted to hold as partner advanced large sums of money to certain merchants, and took as security a charge on their business with extensive power of control, and stipulated for a large commission on their profits whilst any thing remained due to them, and for payment of his principal and twelve per cent interest. The court held that the transaction was a loan, and that the lender was not liable as partner. This, like the case of *Harvey v. Childs*, *supra*, is a very strong one, as the lender, like the lender in that case, had by the terms of his agreement, a right to exercise an extensive control over the business. *Pooley v. Dwyer*, 5 Ch. D. 458, is not in conflict with this case. It was not a case of loan. The so-called

Clifton v. Howard.

lenders were not absolutely entitled to a repayment of their loan. Their right to a return of their advances depended upon the success of the business, and so far from having under their agreement a right to insist on a repayment of the full amount loaned, they might be compelled to refund whatever they had already received by way of profits, or on account of their loan. It was therefore not a mere loan of money, to be repaid at all events, but the investment of capital in business, with the risk of loss of that capital in case the business should prove unsuccessful. The parties having agreed to share losses, were partners *inter se* under all the authorities, and they were liable for all losses, even beyond the amount of their investment, because it was not in their power to restrict their liability as partners without forming a special partnership under the statute.

Participation in profits for use of money *inter se*. — The authorities are unanimous to the effect that an agreement to receive a certain share of profits as compensation for a loan does not render the parties partners *inter se*. *Rudick v. Otis*, 88 Iowa, 403; *Emans v. Westfield*, 97 Mass. 280; *Linter v. Milkin*, 47 Ill. 197; *Adams v. Fink*, 58 Ill. 219; *Pinkney v. Keyler*, 4 E. D. Smith, 460; *Satter v. Ham*, 81 N. Y. 831. In *Smith v. Knight*, 71 Ill. 148; s. c., 23 Am. Rep. 94, the Supreme Court of Illinois, after referring to the two cases in that State cited first above, decided that the lender in that case could not be a partner as to creditors, as he was not a partner in fact; that the only question in the absence of estoppel was whether the party sought to be charged as a partner actually was a partner. After citing those two cases the court say: "Those cases were between the alleged partners. It remains to inquire, as this is a case between alleged partners and a third party, whether any act was done by Knight, Baker & Co. to make them partners as to third parties. Notwithstanding this agreement, did they hold themselves out to the public as partners?" The court thus expressly held that the test of a partnership between the parties is the test of a partnership as to creditors in the absence of estoppel, and that therefore no creditor can hold a person liable as partner who is not in fact a partner, providing that he has not estopped himself from denying the partnership relation. This case was also a case of a loan. The purport of the decision is clearly stated in the syllabus: "A. agreed to advance money to B. from time to time up to a certain amount to enable B. to carry on business, and B. agreed to pay interest to A. on the average balance advanced, and also to divide the profits after deducting a fixed sum for expenses; but A. was not to bear any losses. Held, that A. and B. were not partners as to third persons."

Right to sue for accounting. — It has sometimes been stated that participation in profits ought to render the recipient liable on the ground that he has a right to bring an action in equity for an account of the profits in order to fix the amounts coming to him. Now the fallacy of this argument lies in the assumption that no other than a partner can maintain such an action. This is not the law. It is well settled that any person who has a right to a certain share of profits, though he be not a partner, may file a bill for an account of such profits. *Bentley v. Harris*, 10 R. I. 434; s. c., 14 Am. Rep. 605; *Harrington v. Conroy*, 4 C. E. Green, 280; *Harrington v. Churchward*, 29 L. J. Ch. 251; *Sheppard v. Brown*, 4 Giff. 208; *Buel v. Sely*, 5 Ill. App. 116; *Gerr v.*

Redman, 6 Cal. 574; *Ferry v. Henry*, 4 Pick. 75; *Hallett v. Olemstone*, 110 Mass. 83; *Eastman v. Clark*, 16 Am. Rep. 192-249; Collyer on Part., § 45, n.; Story on Part., § 50, n.; 2 Lindley on Part. 946.

Distinction between partnerships as to parties and as to creditors.—Mr. Guy N. Corliss says, in 30 Alb. L. J. 26: "The distinctions which some of the courts have made between partnerships between the parties and partnerships as to creditors has necessitated the use of the phrase "partnership *inter se*." The word partnership implies the existence of an agreement between two or more, and there can be no partnership even as to creditors unless there be a partnership in fact. It is incorrect to say that one not a partner is liable as such because he has held himself out as such to the world. He is not a partner, but is liable on the ground of estoppel. Having shown that upon principle and authority there can be no liability as partner in the absence of estoppel, unless the party sought to be charged is in fact a partner, it remains to be determined what will constitute one the partner of another. The question is not whether he has agreed to sustain a share of the losses; nor does it depend upon his being interested in the partnership funds and property. He may be a partner, even though he has stipulated that he shall not suffer any loss; and even though he has no interest in the partnership assets. These and other circumstances are to be considered in determining the question of partnership, but they are not decisive of that question. The ultimate inquiry in all cases is whether the party claimed to be a partner has become by agreement a principal trader in the business with another. In other words, has he a right to participate as principal trader in the management of the business? If he has, he is a partner. If he has not, he is not a partner, with a single exception, which however is rather apparent than real. The exception is this: A person may be a partner, even though he has by express agreement intrusted the control of the business exclusively to his associate in the business. The question, strictly speaking, is not whether the party has a right to control the business as principal trader in the particular case, but whether he would have such right in that case by virtue of the agreement between himself and another, in the absence of any express provision conferring that right upon his associate in the business. If it appears that he would have had such right had it not been for his agreement to the contrary, then he is a partner, and his agreement merely operates as a surrender to his associate of a right which he would otherwise have enjoyed. The question of partnership is to be determined by the three following rules:

1st. When the recipient of profits has, by virtue of an agreement with another, a right to participate as principal trader in the management of the business out of which the profits are to arise, then he is a partner, and liable as such; and no secret intent not to become a partner, and no provision in the contract restricting his liability or exempting him from all liability, will afford him immunity from the responsibilities of a partner.

2d. When the recipient of profits would, in the absence of any express provisions in the agreement to the contrary, have by virtue of such agreement a right to participate as principal trader in the management of the business, then he is a partner, even though he has expressly agreed that his associate

Clifton v. Howard.

in the business shall have the right to exercise exclusive control in conducting the business.

8d. In all other cases the recipient of profits is not a partner, and cannot be held liable to creditors unless he has estopped himself from denying that he is a partner."

Participation in profits and losses. In *Donnell v. Harshe*, 67 Mo. 170, cited in the principal case, it was said: "The instruction asserts, as a matter of law, that the occupancy and cultivation by one of the farm of another, under an agreement that the owner and occupant will divide the crops raised in an agreed proportion, constitutes the owner and occupant copartners. This is probably a very common mode of leasing farms in this State, but the proprietor and occupant might be equally surprised to be informed that they were partners.

"A definition of partnership, broad enough to embrace all cases and narrow enough to exclude such as ought to be excluded, has been found a very difficult and embarrassing task to those writers who have published books on the subject. The courts have been embarrassed also in nice refinements about partnerships *per se*, and partnerships which are only as to creditors. Indeed, Judge STORY, after a prolonged examination of these distinctions, seems to conclude that the intention of the parties ought to be the controlling circumstance to determine their relations, and therefore where the profits and losses are to be shared by the parties in fixed proportions, and to use his language, 'each is intended to be clothed with the powers and rights and duties and responsibilities of a principal, either as to the capital stock or the profits, or both, there may be a just ground to assert, in the absence of all controlling stipulations and circumstances, that they entered a partnership.' This, it will be perceived, is quite indefinite.

"It is essential to a partnership that there be a community of interest in the subject of it, and this community of interest must not be that of mere joint tenants or tenants in common. When the effect of the agreement is, as propounded in the instruction, that one should occupy and cultivate the farm, and the crops should be divided equally between the occupant and the owner, no partnership is necessarily intended or created. In the case of *Dry v. Boswell*, 1 Camp. 329, where there was an agreement between the owner of a lighter and a lighterman, that the lighterman should work the lighter, and the gross earnings should be equally divided between him and the owner. Lord ELLENBOROUGH held that this was only a mode of paying the lighterman his wages, and was not a participation in profits and loss, and no partnership existed. So in *Ambler v. Bradley*, 6 Vt. 119. A. owned a saw mill and agreed with B. that the latter should work it, and divide the gross earnings equally; they were held not to be partners. In *Putnam v. Wise*, 1 Hill, 234, an agreement between the owner of a farm and the occupier, that the latter should work it on shares, and a division be made of the gross earnings of the farm, was held not to be partnership. In *Dwinel v. Stone*, 20 Me. 884, it was held that a mere participation in profit and loss does not necessarily constitute a partnership. 'There must be,' said C. J. SHIPLEY, 'such a community of interest as empowers each party to make contracts, incur liabilities, manage the

Carrington v. City of St. Louis.

whole business and dispose of the whole property, a right which upon the dissolution of the partnership by death of one passes to the survivor, and not to the representatives of the deceased.' In *Caswell v. Districh*, 15 Wend. 879, the court held an agreement between landlord and tenant, that the tenant should sow certain kinds of grain, and yield a certain portion of each crop to the landlord, made them tenants in common with the crops. In *Denny v. Cabot*, 6 Metc. 82, an agreement was made between H. and B. by which H. was to supply B. with stock to be manufactured into cloth, at his mill, on H.'s account, and B. was to manufacture the stock into cloth and deliver the cloth to H. at a certain sum per yard, and H. could pay him one-third part of the net profits of the business, and this was held not to make A. and B. partners. In *Harrower v. Heath*, 19 Barb. 381, an agreement similar to the one to establish which proof was offered in the present case, was held to constitute the owner and occupiers tenants in common, both of the farm and the crops. And in *Johnson v. Hoffman*, 53 Mo. 504, a similar contract was held to make the landlord and tenants merely tenants in common of the crops and not of the farm. It is useless however to multiply authorities on this subject, as hardly any two cases are exactly alike, and very slight shades of distinction lead to different conclusions. The instruction was erroneous, as we think, and the judgment must therefore be reversed."

Hankey v. Becht, 25 Minn. 212, is in harmony with the principal case.

CARRINGTON V. CITY OF ST. LOUIS.

(39 Mo. 206.)

Municipal corporation — defect in street — knowledge of policeman.

Knowledge by a policeman of a defect in a city street is imputable to the city.*

ACTION for personal injuries by defect in a street. The opinion states the case. The plaintiff had judgment below.

Leverett Bell, for appellant.

O. G. Hess, for respondent.

BLACK, J. The plaintiff, a minor, brought this suit by his next friend to recover damages for injuries sustained by falling against iron trap-doors of a cellar-way in a sidewalk in the city of St. Louis. The doors covered a cellar-way opening into a building used and

* To same effect, *Rehberg v. Mayor, etc.* (91 N. Y. 187), 48 Am. Rep. 657.

Carrington v. City of St. Louis.

occupied by the police commissioners as a police station. The defendant, Batte, who was a member of the police force, opened the doors, painted them, propped them open with a stick and left them in that position to dry. Plaintiff fell upon them and received severe injuries.

1. It is the duty of the city to keep its street and sidewalks in a reasonably safe condition for persons travelling thereon with ordinary care and caution. This duty and a consequent liability extends to those cases where the obstruction or unsafe condition of the street is brought about by persons other than the agents of the city. *Bassett v. St. Joseph*, 53 Mo. 298; s. c., 14 Am. Rep. 446; *Russell v. Columbia*, 74 Mo. 490. But in such cases it devolves upon the plaintiff to show that the city had notice of the defect or ought to have had knowledge thereof by the use of reasonable care and watchfulness. The court told the jury that Batte was not the agent of the city, and that his negligence was not its negligence, and left it to them to determine "whether the dangerous condition of the sidewalk and cellar-way was known to the city, or by the use of ordinary care might have been known to it in time to have the same safe and thus prevented the injury." Assuming that the policeman was not the agent of the city then there is no evidence that any agent had knowledge of the defect. Obviously then, under the principles of law before stated and the instruction which is in conformity therewith, the question is, was there evidence entitling the case to go to the jury on the ground that the defendant should have known of the defect.

[Omitting this question.]

2. But was Batte, the policeman, an agent or an officer of the city of St. Louis? If he was not, it is by reason of the various special acts of the general assembly establishing a board of police commissioners within and for the city of St. Louis. Chapter 6, appendix to volume 2, Revised Statutes, 1879. By these acts four of the commissioners are appointed by the governor. The mayor of the city is ex-officio a member and president of the board. The members of the police force are appointed by the commissioners, removed by them and under their exclusive control and not subject to the orders of or interference by the municipal assembly. The commissioners and the force under them are charged with such duties as are usually imposed upon public officers and are commanded among other things to "protect the rights of persons

and property," and to "prevent and remove nuisances on all streets, highways, waters and other places." The commissioners are required to make an estimate annually of the amount of money necessary to enable them to discharge their duties and to certify the same to the municipal assembly and that body is required to make an appropriation therefor, and the disbursing officer of the city is to make payments to the commissioners on their requisition. By a subsequent act (§§ 20 and 21 of said chapter 6), the municipal assembly has power to increase the police force and to increase or diminish and regulate the pay of the police upon the recommendation of the commissioners. By a still subsequent act, passed in 1873 (§ 23 of chapter 6), the municipal assembly has "power to fix the salaries of the police force," not to exceed certain designated amounts. Section 88 of the same compiled laws (vol. 2, p. 1535, Rev. Stats., 1879), is as follows: "The members of the police force of the city of St. Louis, organized and appointed by the police commissioners of said city, are hereby declared to be officers of the city of St. Louis, under the charter and ordinances thereof, and also to be officers of the State of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this State or the ordinances of said city." All private watchmen, detectives and policemen serving in the city are to obtain a license from the president of the commissioners."

It is plain from these provisions of the law that the police force constitutes a department of the city government. While these officers are State officers for some purposes they are also city officers. They are none the less city officers because for reasons deemed best by the legislature they are under the control of the commissioners, and not the assembly. We see that by express law they are made city officers. No such declarations seem to have been made in the statute with respect to the board of police commissioners of Baltimore, under which the case of *Attwater v. Mayor, etc.*, 31 Md. 462, was decided. There it was held the city was not liable for a failure to remove a nuisance from a public street, because the power to remove the nuisance was lodged in the police and not the city, and the police officers were held not to be city officers. The difference between the statute there and here is material.

But though we must conclude that Batte was an agent of the city, yet it does not follow that the city is hable for all of his neg-

Harris v. Hannibal and St. Louis Railroad Company.

ligent acts. The rule of law is well settled that a municipal corporation is not liable in damages for the wrongful or negligent acts of its police or other officers in the execution of powers conferred upon the corporation or officers for the public good, and not for private corporate advantage, unless made liable by statute law, expressly or by implication. *Armstrong v. Brunswick*, 79 Mo. 319; *Kiley v. City of Kansas*, 87 Mo. 103; Dill. Mun. Corp. (3d ed.), § 975; *Murlaugh v. St. Louis*, 44 Mo. 479. But we do not see how these principles of law can aid the defendant here, for it is the unquestioned duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons travelling thereon, and it is liable in damages to one injured by reason of negligence in this behalf. Again the city is liable for the negligent use of its own property, the same as private corporations. Dill. Mun. Corp. (3d. ed.), § 985.

The bill of exceptions in this case recites that it was shown by the defendant that the police station, the building, belonged to and was occupied by the board of police commissioners. We do not understand by this that the title to the property was in them, or that they could hold the title to real estate. The building was evidently furnished by or at the expense of the city of St. Louis. We conclude that as to the act in question Batte was the officer and agent of the city, and that his knowledge of the condition of the trap-door was notice to and knowledge thereof on the part of the city.

[Omitting minor point.]

All concur.

Judgment affirmed.

HARRIS V. HANNIBAL AND ST. LOUIS RAILROAD COMPANY.

(89 Mo. 232.)

Carriers—contributory negligence—passenger on freight train.

A passenger in the caboose of a railway freight train, on the stopping of the train a quarter of a mile short of his destination, got up to walk to the door and was thrown down and injured by the sudden backing of the train. *Held*, that his negligence prevented his recovery of damages. (*See note, p. 118.*)

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Harris v. Hannibal and St. Louis Railroad Company.

Vinton Pike and Strong & Mosman, for appellant.

W. N. Boulware, for respondent.

NORTON, J. This is an action to recover damages for injuries to plaintiff while a passenger on one of defendant's trains, and alleged to have been occasioned by the carelessness and negligence of defendant's servants in managing the train, whereby he was thrown down on the floor of the car and seriously injured. The answer was a general denial, and also set up contributory negligence on the part of the plaintiff. The case is before us on defendant's appeal from the judgment rendered for plaintiff. At the close of plaintiff's evidence defendant asked an instruction by way of demurrer to it, which the court overruled, and this action of the court is assigned as one of the grounds of error.

The only witness on behalf of plaintiff, as to the circumstances under which the injury complained of was inflicted, was the plaintiff himself, who testified in substance that he took passage in a caboose attached to one of defendant's freight trains, to be carried from Palmyra to West Quincy; that the train, before reaching the depot at West Quincy, stopped about a quarter of a mile therefrom; that ten or fifteen minutes after it stopped he got up to see if he was to get off there, it occurring to him that he had seen a notice that passengers would be expected to alight when the train stopped; that he knew the train was not at the depot; that the train generally went further east toward the depot than it did on this occasion before it stopped; never had known it to stop so far away to let passengers off; supposed they were going down to the depot till they remained there longer than usual; that while he was walking to the door of the car a coupling was made, causing a more violent concussion or jar than he ever before experienced, though he had been in the habit of riding on trains for many years, which threw him down on the floor of the car, inflicting the injury for which he sued; that he may have heard the cars moving; that he was thinking of business and did not notice particularly; that he supposed he could have heard the cars while he was seated, and that he did probably hear them, but did not remember; that when he got up from his seat some person was sitting in a chair, and that on getting up after the concussion or jar which threw him down, he saw the chair on top of the person who occupied it.

Harris v. Hannibal and St. Louis Railroad Company.

As the demurrer to the evidence admits not only the truth of the facts disclosed by it, but also every inference in favor of the plaintiff which could be reasonably deduced from them, we are of opinion that the court did not err in overruling the demurrer. The train men and several others who were passengers in the caboose when the cars were coupled were introduced as witnesses on behalf of defendant, all of whom testified that the coupling was made in the usual manner, and that there was no jolt or jar more than was usually incident to the coupling of freight cars, flatly contradicting plaintiff in these particulars. In view of this state of facts, and that discomforts and dangers are more incident to travel on freight than on passenger trains, and hence calling for a higher degree of care on the part of the passenger, the eleventh instruction asked by defendant and refused by the court ought to have been given, the giving of which is fully warranted by the cases of *Henze v. Railroad*, 71 Mo. 636, and *Powell v. Railroad*, 76 Mo. 80.

The instruction is as follows: "If the jury believe from the evidence that plaintiff knew, or by the exercise of ordinary care, could have known, that the train had stopped to do some switching, and by the exercise of ordinary care could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would likely be produced in the caboose, and that the plaintiff then, without thinking about the approach of the cars, and without paying any attention to whether the cars were approaching or not, left his seat and stood up in the car, and was thrown down and injured, when he would not have been had he kept his seat, or resumed the same before the cars struck, then the plaintiff was guilty of such contributory negligence as bars his recovery, and the jury must find for defendant."

For the refusal to give this instruction the judgment is reversed and the cause remanded.

All concur.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER. — A case somewhat resembling this is *Prest., et al., v. Leonhardt*, 66 Md. 70, in which it was held that while it is a reasonable safeguard against accidents to forbid departure from a car while it is in motion, a passenger on the upper floor of a horse car does not violate this regulation in walking, the car being in motion, toward the rear end for the purpose of descending to the lower platform. The court said:

"When a person leaves a car while it is in motion, he is affected by its mo-

Harris v. Hannibal and St. Louis Railroad Company.

mentum, and incurs more or less danger. It therefore seems to us a reasonable safeguard against accidents, to forbid departure from the car at such a time. But the plaintiff was not violating this rule of the defendant when the accident occurred. He was walking on the upper floor of the car on his way to the place where he was to descend to the lower platform. When he reached this platform, he would be in a position to depart from the car; and he would then be required to see that it was stopped before he left it. But surely it is very unreasonable to deny to a passenger the right to move about on the floor of a car while it is in motion. And the concurring experience of the travelling public will show that such restraints are not imposed. It does not seem to us that we can declare that the act of the plaintiff was in law inexcusable negligence. It was a matter which the jury were properly required to consider in connection with the circumstances existing at the time; and if they thought that it showed a want of reasonable caution, it was their duty so to find by their verdict."

Wood says (Ry. Law, § 801): "A passenger is not bound to keep his seat during the whole trip. *Gee v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 161. In the case last cited, the passenger stood up to look out of a window, and leaning against the door, which had been improperly secured, he fell out and was injured. COCKBURN, C. J., said: 'The passenger did nothing more than that which came within the scope of his enjoyment while travelling, without committing imprudence. In passing through a beautiful country, he is constantly at liberty to stand up and look at the view; not in a negligent, but in the ordinary manner of people travelling for pleasure.' In an English case, *Adams v. Lancashire, etc., Ry. Co.*, L. R., 4 C. P. 789, a passenger left his seat several times and closed the door of the coach, which was insufficiently fastened. The fourth time he made the attempt he fell out and was injured, and the court held there could be no recovery."

See *West. Md. R. Co. v. Stanley*, 61 Md. 266; s. c., 48 Am. Rep. 96.

A passenger, hearing his station announced, and after the car had entered it, left his seat and stood inside the closed door, for the purpose of hastening his departure. While standing the car collided with another and he was thrown down and hurt. *Held*, that the question of contributory negligence was for the jury. *Barden v. Boston, etc., R. Co.*, 121 Mass. 426; *Worthen v. Grand Trunk Ry. Co.*, 125 Mass. 99.

On the cars entering the station the plaintiff arose from his seat to button his coat, in preparation for leaving the car, and was thrown down by the collision of the train with a bumper at the end of the track. "There is no ground for imputing negligence to the plaintiff. It is probable that if he had retained his seat the injury would not have happened. He had no notice of danger, and had a right to assume that the train would be stopped in the usual manner. * * * He did as passengers usually do, and what the company must have known they were accustomed to do, and the plaintiff could not have supposed that the act was inconsistent with safety." *Wylde v. Northern R. Co.*, 53 N. Y. 156.

Passengers in a street car, after having signalled to stop, may arise and prepare to leave the car. "There is no rule of law which requires him to keep

Harris v. Hannibal and St. Louis Railroad Company.

his seat until the very moment that the car has actually stopped." *Nichols v. Sixth Ave. R. Co.*, 88 N. Y. 181.

In *Lopointe v. Middlesex R. Co.*, Mass. Sup. Ct., Feb. 24, 1887, upon the trial of an action to recover damages received by the plaintiff from being thrown down while riding in an open street-car on defendant's road, defendant requested the following instruction: "If the jury believe the plaintiff took an unsafe position in standing up between the seats in an open car, she cannot recover." *Held*, properly refused. The court said: "It is said by CHAPMAN, J., in speaking of horse railroad cars in *Meesel v. L. & B. R. R. Co.*, 8 Allen, 234, 'the seats inside the car are not the only places where the managers of the train expect passengers to remain, and it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them after there is no place to stand except on the steps of the platform.' These remarks apply to the open cars used by the horse railroads as well as the closed cars. That such positions are less safe than those in the seats, from the danger from jolting, stopping or the motion of the cars, especially around curves, is certainly true, but they are not therefore necessarily so hazardous that one occupying such a position should be thereby prevented from recovering if injured by want of due care in the management of the cars. The passenger has a right to believe that it will be conducted and operated in view of the fact that some of the passengers are or may be standing and steadying themselves by the seats, rails or straps that may have been provided for that purpose."

In *Camden, etc., Steam Ferry Co. v. Monaghan* (Penn.), 10 W. N. Cas. 47, the plaintiff was a passenger on the defendant's ferry boat, and as the boat approached the wharf, stood up in the cabin, as others did, and was thrown down and injured by the collision of the boat with the bridge. The court said: "Of course it is true that if she had remained in her seat she would not have been injured, but it does not necessarily follow that her act of leaving her seat was contributory negligence. Had she occupied a place of manifest danger, as for instance, a position very near to the end of the boat, where there was no railing, the contention of the defendant would be much more appropriate, and would perhaps be conclusive against her. But the position she was in at the moment of the accident was not one of apparent danger at all. * * * It is the uniform habit of persons riding on steamboats to be upon their feet at will while the boat is in motion, and especially as it approaches the landing. It is one of the most comfortable and satisfactory features of steamboat travel that passengers are at liberty to move about from place to place on the vessel while it is in motion."

In *The Manhasset*, U. S. Dist. Ct., East. Dist. Virginia, Feb., 1884, HUGHES, J., held that where in a libel for damages for the killing of a husband and father the ferry steamer inflicting the injury was in fault, but the deceased had violated rules of the managers, forbidding passengers to step over guard-chains and passing off to the wharf before the boat was drawn up and made fast at the landing, in doing which deceased received fatal injuries, but in doing so only did what men and boys habitually and constantly did on the ferry, without restraint or remonstrance from the management, this was not

Harris v. Hannibal and St. Louis Railroad Company.

such contributory negligence on the part of deceased as to exonerate the claimants from responsibility in damages, the managers of the ferry having, by neglecting to enforce their rules, held out to passengers that there was no practical danger in violating them, and thereby put the deceased off his guard as to the danger attending the practice, which was habitually permitted. The case turns upon the question: "Was any thing presented to arrest his attention and to warn him of the fate which overtook him?" because it is a principle of the law of contributory negligence that a carrier is not necessarily excused because the injured person knew that some danger existed through the carrier's neglect, and voluntarily incurred the danger. *Clayards v. Detrick*, 12 Q. B. 489. Where for instance a traveller crossed a bridge which he knew to be somewhat unsafe, but which its managers had not closed, nor warned the people not to pass, and the traveller's horse fell through and was killed, it was held that he was not in fault, and damages were recovered. *Humphreys v. Armstrong Co.*, 56 Penn. St. 204. So it was held that the plaintiff might recover where a passenger train was moving very slowly by, but did not stop at a depot where it should have stopped, and a passenger was injured by leaping off, notwithstanding the usual warning that passengers must not get off the train while in motion, the slow gait of the train seeming to invite the passenger to get off. *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 47. These cases sufficiently illustrate the principle of the law of contributory negligence, that though the passenger must do what a prudent person should do to avoid accident in any particular circumstance in which he may stand, yet if he has reason to infer from the conduct and policy of the carrier that no practical danger would attend an act, though there might be some risk, and if he is thereby thrown off his guard respecting it, the carrier is liable.

It is not necessarily negligent for a passenger on a ferry-boat to stand near the bow while the boat is landing. *Peeverly v. City of Boston*, 136 Mass. 366; s. c., 49 Am. Rep. 366.

In *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306, the court said: "We do not think that the evidence will warrant us in holding, as matter of law, that the plaintiff is chargeable with contributory negligence in taking his place inside the bulwarks, yet outside the partition between the gangway and the main part of the boat. There is nothing to show that it was a position of such obvious or well known danger as that an ordinarily prudent and cautious man would hesitate to remain standing there, at the moment of the starting of the boat, to take leave of friends on the wharf."

In *Continental Passenger Ry. Co. v. Swain*, Penn. Sup. Ct., Jan., 1883, 18 W. N. Cas. 41, a woman entered a crowded street car, on a stormy night, and being unable to obtain a seat or a strap by which to hold on, was obliged to stand unsupported, and was thrown down and injured by a sudden and violent jerk of the car. It was held that she was not guilty of contributory negligence. So it was held in *West Phila. Pass. Ry. Co. v. Whipple*, 5 W. N. Cas. 68, where a woman, unable to obtain a seat, and unwilling to disarrange her dress by reaching a strap, held on by the hands of a friend—a woman. The court said: "Possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up as to deprive her of the natural power to help herself; but if so, the question is one of fact and not of law."

KINCHELOE v. PRIEST.

(89. Mo. 240.)

Badiment — negligence — burden of proof.

In an action for the defendant's negligence in suffering a note given to him for collection to be barred by the statute of limitations, there is no presumption that he was to have compensation, and the burden of proof is on the plaintiff to show his liability.

THE opinion states the case. The defendant had judgment below.

Smoot & Pettingill, for appellant.

W. T. Kays and *D. H. McIntyre*, for respondent.

BLACK, J. The plaintiff, in 1867, before leaving this State, gave to the defendant's testate, Green, fourteen notes, and took a receipt therefor, in which it is stated that the notes are to be collected and accounted for. Green died in 1882, and plaintiff filed an account in the Probate Court, giving a list of the notes and stating that he did not know whether the notes had been collected; that they could have been collected, and if not, deceased suffered them to become barred by the statute of limitations; that deceased was to have five per cent for his services, and that the estate owed him, etc.

Three of the notes, signed by Downing and others, and one small one signed by Green, in all amounting to about seven hundred dollars, were found by the executor among the papers of the deceased, with credits upon the Downing notes. Some correspondence offered in evidence shows that from 1867 to 1882, Green collected and remitted to the plaintiff various sums of money, and the evidence is strong to the effect that he remitted, or applied, all money collected. Green, in a letter dated in 1867, says Downing had promised payment in the following January. In 1881, he says Downing had promised several times to pay, and expressed some fears about the Arnold note, and in 1882, speaking of this same note, which was signed by Downing, he says he let the date slip out before he knew it, and that Mr. Downing said "a note never dies with him." The real contest is as to the barred notes.

The court, for the plaintiff, instructed the jury that if deceased, while in the discharge of his trust, negligently permitted the statute

of limitations to run against a part of the notes, and by reason of said neglect the debts were lost, then the plaintiff was entitled to recover; and refused to instruct that if the notes could have been collected by resorting to legal means, and yet were allowed to run until barred, the plaintiff should recover. The court, of its own motion, in substance told the jury that if the deceased in his life-time, exercised the same kind of care in the collection of the notes that an ordinary prudent man would have done with his own business affairs, then the verdict should be for the defendant as to the barred notes.

1. There is no doubt but the confidence induced by undertaking services for another is a sufficient consideration for a faithful discharge of the trust. 2 Pars. Cont. (6th ed.) 98. And a depositor makes out a *prima facie* case, even against an unpaid bailee, by showing a deposit made, demand for and refusal of the thing deposited. *Huxley v. Hartzell*, 44 Mo. 370; *Wiser v. Chesley*, 53 Mo. 547. But this case does not assume that form of action. So far as the barred notes are concerned, it is based upon negligence of the deceased. In all such actions the burden of proof rests upon the plaintiff, and he must prove each material fact necessary to create a liability. Edw. Bailm., § 106. The first refused instruction asked the court to tell the jury that the written agreement, the receipt, implied a consideration to be received by Green out of the notes to be collected by him. The receipt did not so say, and it was not the proper province of the court to so declare. The evidence must determine whether the undertaking was gratuitous or not, and the jury should take all the circumstances into consideration. The plaintiff does not appear to have made any effort to show that Green was to have any compensation, nor did he seek to have that question submitted to the jury as a question of fact, but relied upon a supposed presumption of law which does not arise in this case. It is said in Schouler on Bailments, page 35, if the bailee received the thing in the usual course of his business, and business usage or his known method of dealing with other customers, gave him the right to demand compensation, then the trust, though accepted without express reference to a charge for services, is not to be taken as gratuitous. Further on the same author says: "But attendant circumstances should be allowed their weight; and where one undertakes, for a near relative or personal friend, or out of mere charity or favor, and more especially if accomplishing the trust puts him to little outlay of time, trouble and skill, and the bail-

Kincheloe v. Priest.

ment lies outside his remunerated field of labor, we may well presume the undertaking to have been gratuitous." And in *Mariner v. Smith*, 5 Heisk. 203, where one deposited a quantity of gold with a firm engaged in the boot and shoe business, and the gold was stolen from the safe of the merchants, it was held to be error to instruct the jury that if the nature of the bailment was of such a character as to require extraordinary care and responsibility on the part of the bailee, the law will imply a reward. Here there is no direct evidence showing that Green received or was to receive any compensation. The parties appear to have been personal friends and neighbors. Green was a farmer and conducted a small country store, and there is no claim that he in any way assumed to be a collecting agent. These facts all tend to show that the undertaking was gratuitous. If the plaintiff desired to put the case before the jury on the theory that Green was a paid agent, he should have asked the court to submit that question to the jurors as a question of fact; but it is evident no such a claim was made, or intended to be made on the trial, save by way of a presumption of law. The instruction was properly refused.

In *Edwards on Bailments*, section 77, it is said: "And there is a class of cases, in which without any delivery of goods or property, an unpaid agent is held responsible for the use of diligence in the business he undertakes; as where a man receives a demand to collect gratis. * * * The effort to collect must be made with ordinary diligence." This is stated to be the rule in this class of cases in *Newell v. Newell*, 34 Miss. 385, which is a case in some of its features resembling the present one. The degree of care which the court required of the deceased in the collection of the notes was the same kind of care that an ordinary prudent man would have used with his own business affairs. This stated the rule favorably to the plaintiff. Nothing appears to have been said in the evidence as to the solvency of the makers of the notes, though it was probably assumed on trial by both parties to the suit, that something could have been made out of Downing by suit. There is no claim of want of good faith on the part of the deceased. The instruction presented the case fairly enough.

[Omitting minor points.]

The judgment is affirmed.

Judgment affirmed.

HENRY, C. J., and SHERWOOD, J., dissent; the other judges concur.

Thorpe v. Missouri Pacific Railway Company.

THORPE V. MISSOURI PACIFIC RAILWAY COMPANY.

(89 Mo. 650.)

Master and servant — contributory negligence — remaining in service.

An employee of a railroad company complained to the yard-master that the work on which he was engaged was unsafe, because enough hands were not furnished to perform it. No promise to furnish more was given. The employee continued in the service and was injured. *Held*, that he was not negligent as matter of law. (*See note, p. 125.*)

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

T. J. Portis and Bennett Pike, for appellant.

Woodson & Slaughter, for respondent.

RAY, J. This is a suit for damages for personal injuries sustained by plaintiff, whilst in the employment of defendant as a switchman in its yards at Kansas City, Missouri. A trial thereof, in the Circuit Court of Jackson county, resulted in a verdict and judgment in plaintiff's favor in the sum of \$2,500, from which defendant has appealed to this court. In his amended petition plaintiff charges a failure of duty on the part of defendant to furnish a sufficient number of hands in conjunction with plaintiff to carry on the business of making up trains in defendant's yards, and in conveying signals with proper dispatch and safety; that defendant was duly notified of this; that about the time of the injury plaintiff had gone between two of the cars, and had attempted to couple them; that failing to do so he stepped out and gave a stop signal, and then went again between the cars to effect the coupling, but that owing to the insufficiency of help employed to assist him, said stop signal failed to reach the foreman of the work, or the engineer, in consequence of which the foreman gave the signal to the engineer to back the cars, which the engineer did, and that plaintiff's hand was caught between two of said cars, and thereby injured, and that the same was caused without any negligence on his part.

[Omitting minor questions.]

Thorpe v. Missouri Pacific Railway Company.

But again counsel for defendant urge a further question and objection to the recovery in this action, which is that the testimony of plaintiff himself shows that whatever danger there was in working in the yard of defendant with three men was well known to him more than a week before his alleged injury, and that he continued in said work, under such circumstances, and with such knowledge, until the happening of the accident. That he therefore voluntarily assumed the risk, waived the obligation of the defendant to furnish an additional workman, as to himself, and if he was injured by such delinquency on the part of the railway company, he is without remedy against the company for damages.

This was, as already stated, set up in the answer of defendant as a further defense to the action. A proper disposition of this question, which is, we think, the most important in the case, makes it desirable, if not necessary, to state the facts especially pertinent and relevant in this connection. The evidence advanced upon the trial shows that plaintiff had considerable experience in this branch of the railroad business; that some months previous to the accident he had worked for a while, perhaps for three or four weeks, for defendant, in its said yards at Kansas City, where he was injured; that about ten days before the accident happened, he had again resumed work for defendant in this capacity, at which time there were, including plaintiff, four men in the "switch crew," but that a few days thereafter one of the men quit work, leaving plaintiff and two others to do the work. Plaintiff had complained of the insufficiency in the number of the hands to the yard master, previous to the accident. He also says, in his evidence, that while four men were necessary to do the required work, he remained when there were but three men, because he thought, by being careful, they might go ahead.

The question then is, whether the plaintiff, in remaining at work under these circumstances, must be held to have waived the discharge of defendant's duty to him in this behalf, and to have assumed the risk incident to the performance, or attempted performance of the work, with three men instead of four; or in other words, was his knowledge of the dangers and risks involved in his undertaking to carry on the work with the reduced force, such as will necessarily charge him with negligence? In some of the cases of this sort where a recovery has been denied, the servant has been deprived of his right of action upon the ground of waiver, and

Thorpe v. Missouri Pacific Railway Company.

assumption of the risk, and in others upon the doctrine of contributory negligence. Shearm. and Redf. Neg. 126; *Clarke v. Holmes*, 7 H. & N. 937; *Laning v. Railroad*, 49 N. Y. 541; s. c., 10 Am. Rep. 417.

Again it is said that mere continuance in the employment, with knowledge of defective or inadequate appliances, causing the injury, is not necessarily fatal to the right of action. 3 Wood Railway Law, 1460. And that such previous knowledge of danger is only a part of negligence, or that it is a strong circumstance tending to show negligence on the part of the servant, or at least one to be considered, but that it is not necessarily decisive or conclusive. *Snow v. Railroad*, 8 Allen, 450; Wood Mast. & Serv. 720; *Clarke v. Holmes*, 7 H. & N. 942. The servant is not necessarily chargeable with negligence in remaining in the employment, although he may know that the appliances are defective and insufficient, if the danger or risk is not such, that as a prudent man he was bound not to assume them, and to refuse to continue in the service. Shearm. & Redf. Neg. (3d ed.) 125; Wood Ry. Law, 1460; Wood Mast. & Serv. 761; *Snow v. Railroad*, *supra*; *Patterson v. Railroad*, 76 Penn. St. 389; s. c., 18 Am. Rep. 412; *Filer v. Railroad*, 49 N. Y. 50; s. c., 10 Am. Rep. 327; *Clarke v. Holmes*, 7 H. & N. 942. If the defects or insufficiency in the appliances, which term embraces the men employed to do the work, as well as other instrumentalities employed, is so great that obviously, with the use of great caution, the danger was imminent, then as a matter of law, the servant who incurs the risk is guilty of contributory negligence, and cannot recover. But if upon this question there is substantial doubt, the question is one of fact for the jury, and a nonsuit or demurrer to the evidence is not permissible. Wood Ry. Law, 1460; Wood Mast. & Serv. 761. Perhaps the leading case upon this subject is that of *Snow v. Railroad*, already cited. In that case the plaintiff had been aware of the defect that caused his injury for more than two months previous to the accident, and a suggestion was there urged similar to the one now being considered, that plaintiff ought not to recover because he continued in the performance of his duties after he was aware of the defect, but the court refused to so hold as a matter of law upon the ground "that his continuance in the employment did not necessarily and inevitably expose him to danger."

Speaking for this court in the case of *Conroy v. Vulcan Iron Works*, 62 Mo. 39, WAGNER, J., uses this language: "Where the

Thorpe v. Missouri Pacific Railway Company.

defect is so glaring that with the utmost care and skill the danger is still imminent, so that none but a reckless man would incur it, then if the servant will engage in the hazardous undertaking, he must be considered as doing it at his peril. But if the defective machinery or appliances, although dangerous, are not of such a character that they may not be reasonably used by the exercise of skill and diligence, the servant does not assume the same risk. He is required to take, and will be held responsible for the care incident to the situation in which he is placed, and whether he exercised that degree of caution is a fact for the determination of the jury." But whether based on the one doctrine or the other, is, we think, immaterial. The facts which in the one set of cases are held to show the waiver are such, in effect, as are held to constitute the concurring negligence in the other. Shearman & Redfield, who in their valuable work on Negligence hold that the doctrine is a branch of the law of waiver, say that a party to any other contract having mutual obligations is allowed to fully perform his part, notwithstanding the failure of the other party to fulfill a condition precedent without necessarily waiving his right to insist upon performance of such condition at a later period. It is not fair to require from servants a more peremptory assertion of their rights against the master than would be required between parties standing upon a more equal footing. The dependent position of servants generally makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists, and that they desire its removal. That the real question to be determined in each case is, whether under all the circumstances the master had a right to believe and did believe that the servant intended to waive his objections to the unfitness of his fellow-servant or the defect in the materials provided for the work. It is also held in a number of cases that the assumption of the risk only follows as a result from the servant's remaining after knowledge of the defect, where he continues without objection or protest or complaint on his part. *Thomp. Neg.* 1009, and a line of cases cited in the note to the text.

Under these authorities the question is, was the plaintiff reasonably justified in believing that three men, by being careful, might go ahead with the work, though the same might be more dangerous than usual; or was the danger in so doing so obvious and im-

minent, and injury so probable, that under the same circumstances a prudent man would have regarded it as negligent to perform the particular duties which the work required? Perhaps reasonably prudent men, similarly situated, might have taken different views of this question of their duty in the premises, and if so the case is one for the jury. Indeed the theory of the defense to this action is in part that three men could properly and safely do the required work. To this effect is the testimony of the witness Sheriff, the general yardmaster of the defendant. Plaintiff, with the two remaining men, safely performed the work, or similar work to that in which he was engaged when injured, for a number of days after the other man quit. And this, it is said, is a circumstance entitled to be considered and bearing upon the question of plaintiff's contributory negligence. *Wood Mast. and Serv.* 760, § 386; *Patterson v. Railroad*, 76 Penn. St. 389; s. c., 18 Am. Rep. 413.

While as the event shows the judgment of plaintiff in remaining was erroneous, the danger greater than it appeared to him, it tends to show that it was not so great or obviously imminent that injury therefrom could not reasonably be expected to be avoided "by being careful," which in this connection, we think, means by the use of additional or more than ordinary precaution. *Shearm. & Redf. Neg.* 125. The absence of the fourth man rendered the labor of coupling, uncoupling, switching and handling the cars more onerous generally and more than ordinarily dangerous, but we think we ought not to say upon the evidence before us, as a matter of law, that plaintiff waived the discharge of the defendant's duty to him to furnish sufficient help, and that he voluntarily assumed the particular risk or danger that caused his injury, or that the evidence is such as conclusively indicates a state of facts and circumstances that require him to peremptorily abandon and discontinue his said employment. In this connection we may add that the defendant asked and the court gave at its instance an instruction as follows:

"If you find from all the facts and circumstances in evidence that there was an insufficient number of men furnished by the defendant to do the work in which the plaintiff was engaged with safety; that the danger of carrying on such work with the number of men engaged therein was so apparent, or was known to the plaintiff to be so great that a man of ordinary prudence and caution

Thorpe v. Missouri Pacific Railway Company.

would not have engaged or continued therein, then the plaintiff was guilty of negligence, and you shall find for defendant."

Finding no error in the record, the judgment of the Circuit Court is affirmed for the reasons above stated.

Judgment affirmed.

All concur, except HENRY, C. J., not sitting.

NOTE BY THE REPORTER.—See *Galveston, etc., Ry. Co. v. Drew*, 59 Tex. 10; a. c., 46 Am. Rep. 261.

Wood says (Mast. and Serv. [2d ed.], § 379): "The fact that an employee has complained of a defect, and believes, or has reason to believe, that the defect will be remedied, *unless a promise to repair* is made, does not of itself entitle him to recover for an injury received from such defect. The real question is whether the plaintiff was guilty of negligence in performing the service after knowledge of the defect, and the fact that he has complained of the defect — no promise to repair it being given — does not even operate to relieve him of the imputation of negligence, but may have directly the opposite effect. It is wholly a question of care or negligence, and if the servant knew or ought to have known the danger, and a person of ordinary prudence would have regarded it as dangerous to remain, he cannot recover even though he has complained of the defect." Citing *Ford v. Fitchburg R. Co.*, 110 Mass. 240; a. c., 14 Am. Rep. 526; *Patterson v. R. Co.*, 76 Penn. St. 389; a. c., 18 Am. Rep. 412.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BARRIE V. EARLE.

(143 Mass. 1.)

Contract — of subscription for book in parts — breach.

Under a contract of subscription for a book, to be published in parts, at a certain price for each part, to be paid for on delivery of each part, the subscriber, after receiving one part and paying for it, refused to take any more. In an action for breach of the contract, *held*, that he could not defend on the ground that he was induced to enter into the contract by fraud, without offering to return that part.

ACTION for breach of contract. The head-note states the case. The plaintiff had judgment below.

J. R. Thayer and E. H. Vaughan, for defendant.

G. T. Dewey and T. G. Kent, for plaintiff.

FIELD, J. The first exception is to the exclusion of evidence that the defendant's signature to the contract was obtained by false and fraudulent representations. This evidence was excluded upon the ground that the contract was entire, and that the defendant could not avoid it except by returning the two portfolios which he had received and paid for. The same question of law is involved in the last exception. A majority of the court are of opinion that

Barrie v. Earle.

this is such a contract as is described in *Badger v. Titcomb*, 15 Pick. 409, 413; s. c., 26 Am. Dec. 611, where, "although the agreement is entire, the performance is several;" or as is said in *Denny v. Williams*, 5 Allen, 1, 4, a contract "one and entire in its origin, and yet, looking to the performance of different things at different times, it may be divisible in its operation;" that although an action under it could be maintained for the price of each portfolio when it was delivered, yet that the contract is one entire agreement to take one copy of a publication, made up of ten parts or portfolios, all constituting the art treasures of America; and that it is not a contract containing ten distinct and independent agreements to take ten different portfolios, one under each agreement. See *Vinton v. King*, 4 Allen, 562. The defendant's evidence went to the whole contract, and was offered for the purpose of avoiding the whole contract, and he could only avoid the contract for fraud in its inception by rescinding it *in toto*, and by restoring to the plaintiff the portfolios which he had already received. If the defendant had a right to avoid the contract, and exercised that right, he had a defense to his action, and could recover, in an action brought by him, the thirty dollars he had paid, and the portfolios would all belong to the present plaintiff; but the defendant could not retain part of the portfolios under the contract, and avoid the contract as to the rest. *Clark v. Baker*, 5 Metc. 452; *Morse v. Brackett*, 98 Mass. 205; *Mansfield v. Trigg*, 113 Mass. 350; *Young & Conant Manuf. Co. v. Wakefield*, 121 Mass. 91. It does not follow from this, that the defendant was required to receive any portfolios that were not such as the contract called for, or that if the plaintiff did not from time to time offer to the defendant ten portfolios, each of which satisfied the description contained in the contract, the defendant might not recover damages for a breach of the contract by the plaintiff.

[Omitting minor points.]

Exceptions overruled.

COMMONWEALTH v. MOORE.

(143 Mass. 126.)

Juror — competency — member of association to prosecute.

A member of a voluntary association, formed for the prosecution of violations of certain laws, is incompetent as a juror on the trial of a complaint for such a violation, instituted by an agent of the association, who is furnished by it with money for the expenses, and is paid for his services.*

CONVICTION of nuisance. The opinion states the case.

E. L. Barney, for defendant.

E. J. Sherman, attorney-general, for Commonwealth.

GARDNER, J. Jurors in this Commonwealth are required to be "persons of good moral character, of sound judgment, and free from all legal exceptions." Pub. Stats., ch. 170, § 6. By section 35, upon motion of either party in a suit, the court is required to examine the person called as a juror therein, "to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein." After the examination of the juror, as above provided, the party objecting may introduce any other competent evidence in support of the objection, subject to the discretion of the court. *Commonwealth v. Thrasher*, 11 Gray, 55; *Commonwealth v. Gee*, 6 Cush. 174. If it appears to the court that the juror does not stand indifferent in the cause, he shall stand aside, and another be called in his stead. All this must be done before the jury are impanelled. *Woodward v. Dean*, 113 Mass. 297. The word "suit" has in practice been considered as meaning criminal prosecutions, as well as civil proceedings. *Commonwealth v. Abbott*, 13 Metc. 120; *Commonwealth v. Gee*, and *Commonwealth v. Thrasher*, *ubi supra*; *Commonwealth v. O'Neil*, 6 Gray, 343; *Commonwealth v. Egan*, 4 Gray, 18, 20.

But few cases have arisen under this statute, to which the attention of the court has been called. In *Commonwealth v. O'Neil*, *ubi supra*, which is strongly relied upon by the government in support

* Compare *Boyle v. People* (4 Colo. 176), 84 Am. Rep. 76.

Commonwealth v. Moore.

of the ruling of the Superior Court, three of the jurors were members of "Carson Leagues." The object of the members of such leagues was the prosecution of violations of the laws against the manufacture and sale of intoxicating liquor. They subscribed each a certain sum to the funds of the association for the purpose of defraying the expenses of such prosecutions; and each member was liable to be assessed his proportion of all expenses incurred in such prosecutions, and was liable to pay the same to the extent of his subscription. The court held, that as the exceptions were framed, they could not find enough to show that the judge who presided at the trial was legally bound to set the jurors aside, and that it did not appear "that either of them had any, even the smallest, pecuniary interest in the event of the prosecution." The question whether they stood otherwise indifferent in the result of the trial does not appear to have been raised.

In *Commonwealth v. Egan, ubi supra*, one of the jurors, upon inquiry, stated that he was a member of the Carson League, the object of which society was to prosecute individuals for violation of the liquor law; that assessments were made upon the members for the purpose of carrying out the object of the society; that his membership consisted in subscribing for stock; and that he had paid one assessment, and expected to pay more. The juror further said, that the amount of his assessment would not be changed or affected by the result of this indictment; and that there was nothing in the existence of his membership to prevent his giving a fair and impartial verdict, according to the evidence. The juror was permitted to remain upon the panel. This court held, on the defendant's exceptions, that the court had no knowledge of the assumed obligations of the members of the Carson League, other than what the juror stated to be his understanding of them; and that it was not prepared to decide that in this instance the ruling of the Court of Common Pleas was wrong. Mr. Justice METCALF, in giving the opinion of the court, said: "We deem it to be our duty however to say that in our judgement the members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, cannot be held to be indifferent, and therefore ought not to be permitted to sit as jurors, in the trial of a cause in which the question is, whether the defendant shall be found guilty of violating that law."

One of these cases makes the fact of pecuniary interest in the juror a prominent feature in determining whether he is indifferent, or unfit to sit upon the trial. But this is not the only disqualification to the fitness of a person to sit as a juror. He may be entirely unaffected by the result of the trial, so far as any pecuniary interest is concerned, and yet he may have such ill-will against one of the parties, be so biased or prejudiced against him, that he could not be indifferent. A juror may also stand in such a relation to witnesses to be produced at the trial, that he cannot fairly consider their testimony. In a criminal case, he may be the instigator of the prosecution, and be absolutely unfit to act as a juror in determining the guilt or innocence of the person accused.

The facts in the case at bar, as stated in the bill of exceptions, differ materially from those reported in the cases we have referred to. The juror was a member of the Law and Order League of New Bedford, where the offense charged in the complaint is alleged to have been committed. The league was a voluntary association formed for the enforcement in New Bedford of the laws against the illegal sale of intoxicating liquors, and for the prosecution of liquor sellers. The complainant, Jules Giquel, and one Partridge, both of whom were witnesses at the trial, were agents of the league, and furnished by it with money to pay expenses in carrying on their work, and were also paid for their services. The complainant, with Partridge and three sailors, went to the defendant's bar-room. There was evidence that Giquel paid for some of the liquor ordered, and furnished to them. That the complainant Giquel and Partridge were employed by the league to induce the defendant and others, to sell liquor for the purpose of prosecuting them for violation of the laws, is apparent from the evidence and the instruction given to the jury. The presiding judge instructed the jury, "that persons employed to induce the defendant and others to sell liquor for the purpose of prosecuting them for violation of their licenses should be regarded with great caution and distrust as witnesses. The considerations went to their credit as witnesses, but it was still for the jury to say how much credit should be given them." The juror was a member of a local association, which employed the complainant to induce the defendant to violate the law, in the city of New Bedford, in order that he might prosecute the defendant for such violation, and he was the agent of the juror for this special purpose. He, with his associates, had selected Giquel as a proper person to induce the defendant to

Commonwealth v. Teevena.

violate the law, prosecute him for such violation, and go before a jury as a witness worthy of belief.

It is difficult to see that such a juror was so indifferent, so disinterested and unbiased, that he could regard his agent, whom he had employed through his association, "with great caution and distrust" as a witness. These considerations as to his credit he had already passed upon and determined when Giquel had been selected as agent of the association of which he was a member.

But it is not necessary to go to the extent that the agent of the association was appointed for the purpose of inducing the defendant and others to violate the law. It is sufficient that it appeared that the complainant Giquel was employed, by the association of which the juror was a member, to enforce the laws in New Bedford against the illegal sale of intoxicating liquor, and to prosecute liquor sellers in that city. He thus became the agent of the juror, as well as of the other members of the association. Whether or not he was to appear as a witness at the trial is immaterial in the view we take of the case. The complaint which the juror was to try was originated by his agent, appointed for the purpose of making such complaints. He could not be indifferent as to the result of that prosecution. He could not sit unbiased in determining the guilt or innocence of the defendant upon a complaint instituted by the juror's authorized agent.

We are therefore of opinion that the juror was not competent to sit, and that the Superior Court erred in allowing him to remain upon the panel.

Exceptions sustained.

COMMONWEALTH V. TEEVENS.

(148 Mass. 210.)

Criminal law — bail — indictment for different offenses.

On a complaint, charging A. with the crime of adultery, A. entered into a recognizance with sureties, conditioned that he should appear before the Superior Court at the next term, "to answer to said complaint, and abide the order and sentence of the court thereon, * * * and not depart without leave." The grand jury, at that term, found an indictment against him for lewd and lascivious cohabitation; he pleaded guilty, but did not appear when called for sentence. *Held*, that there had been a breach of the recognizance.

ACTION on a recognizance. The head-note states the point. The plaintiff had judgment below.

J. A. McGeough, for defendant.

E. J. Sherman, attorney-general, for Commonwealth.

DEVENS, J. The recognizance bound the principal to appear before the Superior Court to answer to a complaint for the crime of adultery. He was not in fact indicted in the Superior Court for that crime, but for lewd and lascivious cohabitation. Had an indictment been substituted for the complaint for the same offense as that therein described, the defendant contends, that as the principal could not have been tried in the Superior Court upon the complaint (the offense being one of an indictable character), the lower court had no authority to recognize the defendant to answer thereto, but should have required him to answer any indictment for the offense; and that the recognizance is therefore invalid. This contention cannot be maintained. The cases of *Commonwealth v. Slocum*, 14 Gray, 395, and *Commonwealth v. Butland*, 119 Mass. 317, are quite decisive that a recognizance in this form is valid and sufficient, and binds the defendant to appear and answer any indictment for the same offense charged in the complaint.

Nor should we be prepared to say, that if the recognizance were limited to appearing and answering to a specified offense, it would not equally bind the defendant to appear and answer to any offense which might substantially be included in the offense described in the complaint, even if of a lower grade; as in the case at bar, if the defendant were charged in the indictment with lewd and lascivious cohabitation with the same person with whom he was alleged in the complaint to have committed adultery. We do not find it necessary to consider this inquiry, as the breach of the recognizance claimed by the Commonwealth is that the defendant departed without leave of court; and this is in itself a distinct breach of the recognizance. He and his sureties were called and defaulted upon his recognizance. The Superior Court ruled that the recognizance bound the principal defendant, not merely to appear and answer the specific complaint, but to abide the final order of the court, and not to depart without leave. The condition of the recognizance

is in the form prescribed by the Public Statutes, chapter 212, section 63, and the provision that the conusor shall not depart without leave of court is very ancient, and has been many times held to be separate and distinct from those which bind him to answer to the specified charge, or to all matters which may be alleged against him (a clause which is found in many recognizances), or to stand to and abide the final order and decree of the court thereon.

Even if the principal would be entitled to a discharge, no indictment being found against him, he has no right to decide the question for himself, even if his decision is such as the court would have made. He must apply to the court, or wait until by proclamation at the end of the term, which is the custom of some tribunals, or in some other mode, he is informed that he has leave to depart. Crown Cir. Comp. 46. To hold otherwise, as was said by Chief Justice EWING in *State v. Stout*, 6 Halst. 124, 133, is to substitute "the cause for the effect; a ground of discharge for the actual discharge; a reason for absolving him from the recognizance for the absolution itself."

Again, the object of the provision that the conusor shall not depart without leave of court is that he may be held to answer any charge which may be alleged against him, even if it be different from the specific charge originally made. As bail is substituted for imprisonment, the court still retains over the party giving bail the same rights which it would have had were he in actual custody. It was formerly urged, that if the conusor, being brought into court, should stand mute, his sureties were liable. In answer to this view, it is said, in Bac. Abr. Bail (L): "If a man's bail, who are his jailers of his own choosing, do as effectually secure his appearance, and put him as much under the power of the court as if he had been in the custody of the proper officer, they seem to have answered the end of the law." It is said by Chitty: "If however the sureties are bound by recognizance, that a defendant shall appear * * * the first day of such a term to answer to a particular information against him, and not to depart till he shall be discharged by the court, and afterward the attorney-general enters a *nolle prosequi* as to that information, and exhibits another on which the defendant is convicted, and refuses to appear in court after personal notice, the recognizance is forfeited by the default, for being express that the party shall not depart till he be discharged by the court, it cannot be satisfied unless he be forthcom-

ing and ready to answer to any information exhibited against him before he receives his discharge, as much as to that which he was particularly bound to answer." 1 Chit. Crim. Law (2d ed.), 105; *Queen v. Ridpath*, 10 Mod. 152; 2 Hawk. P. C., chap. 15, § 84. This rule has been repeatedly followed. Indeed it would seem that if the only object of the clause that the defendant should not depart without leave was to detain a party who had been properly held to bail to answer a specific charge, so far as that charge is concerned, it would be unnecessary. It is necessary, because having been held to bail, the defendant is deemed to be as much in the custody of the court as if actually imprisoned. In *State v. Stout*, *ubi supra*, the authorities are carefully considered, and a similar result is reached. See also *People v. Stager*, 10 Wend. 431; *People v. Clary*, 17 Wend. 374; *Keefhaver v. Commonwealth*, 2 Pen. & W. 240; *Starr v. Commonwealth*, 7 Dana, 243. If the provision that the conusor shall not depart without leave is a substantive part of the recognizance in an action upon it for forfeiture by reason of such departure, it is not an answer to say that the defendant might have obtained his discharge from the court, either because nothing was alleged against him by indictment, or because he was not indicted for the same offense as that upon which he had been bound over. Certainly, had the conusor been in actual imprisonment, he would not have been released when other offenses were alleged against him by indictment, without recognizing to answer the same; nor under similar circumstances would he, when brought into court by his bail, or appearing there in person, have had leave to depart except upon similar terms. We are therefore of opinion that the Superior Court correctly ruled, that by the default of the conusor, the recognizance was forfeited, as he was bound not only to appear and answer the specified charge, but also not to depart without leave.

The defendant further contends, that it does not sufficiently appear that the Municipal Court of the South Boston District was authorized to take this recognizance, as its authority was only to do so in a case of which it did not have final jurisdiction, upon examination and the finding of probable cause to believe the prisoner guilty, neither of which appears by the recognizance. The Public Statutes, chapter 212, section 63, provide that no action upon a recognizance shall be defeated or barred "by reason of a defect in the form of the recognizance, if it sufficiently appears from the

Flynn v. Bourneuf.

tenor thereof at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance." As we know judicially that the court by which the recognizance was taken was one authorized, upon proper proceedings, to require and take recognizances for appearance before the Superior Court of those charged with crimes there properly cognizable, it is not necessary, under this statute, that such a recognizance should recite in detail all the proceedings of the court. The act done was one clearly within its lawful authority. The strictness and nicety of the practice at common law, which was adopted in some of our earlier cases, was much altered and modified by the Revised Statutes, chapter 135, section 30, on which the existing statute is founded. *Commonwealth v. Nye*, 7 Gray, 316.

Judgment affirmed.

LEWIS V. NEW YORK SLEEPING CAR COMPANY.

(143 Mass. 220.)

Carrier — sleeping-car company — duty as to passengers' effects.

SUFFICIENTLY reported, 56 Am. Rep. 852.

FLYNN V. BOURNEUF.

(143 Mass. 277.)

Evidence — parol — to contradict deed as to assessments.

In an action for breach of a covenant against incumbrances in a deed of land, parol evidence that a few days before the execution of the deed the parties orally agreed, that in consideration of the execution of the deed for a certain sum, the plaintiff would assume a liability to an assessment upon the land for betterments, is inadmissible.

THE opinion states the case.

W. H. Moody, for plaintiff.

B. B. Jones, for defendants.

HOLMES, J. This is an action on a covenant against incumbrances. At the time of the execution of the deed, the land conveyed was liable to an assessment for betterments, which was afterward made and which has been paid by the plaintiff. It is not disputed that the liability was an incumbrance, or that there would have been a breach of the covenant on general principles. *Carr v. Dooley*, 119 Mass. 294. But the defense relied on is, "that a few days before said deed to the plaintiff was executed and delivered, the plaintiff and the defendants made an independent, distinct and oral agreement, that in consideration that the defendants would execute and deliver the deed in question to the plaintiff for the sum of \$2,200, and would execute and deliver to the brother a deed of the adjoining premises for the sum of \$2,300, the plaintiff would assume and pay all assessments which should be made in accordance with said liability on the lands conveyed by said deeds," and that the deeds were made as agreed.

We interpret the statement which we have quoted to mean that the consideration moving from the defendants was a promise to execute the deeds, not the execution of them. For if it was the latter, then the agreement did not become a contract until the consideration was furnished, and if the deed to the brother was executed after the deed to the plaintiff, which for all that appears may have been the case, then the oral contract was subsequent to the covenant in suit, and the question of its effect, on that state of facts, would be a different one from that which was argued, or which we understand to have been ruled upon.

Assuming that the oral contract was made before the covenant in suit, the purpose for which it is offered is to show, that at the very moment when the specialty purporting to extend to all incumbrances was executed and accepted as determining the extent of the defendants' obligations under the contract expressed by it, the parties expressed by their conduct *in pais* that the deed should have a less operation. We think that this is plainly a contradiction of the covenant, if leaving technical difficulties on one side, the oral contract be relied on as a contemporaneous release or satisfaction of an obligation admitted to be within the language of the deed. *Batchelder v. Queen Ins. Co.*, 135 Mass. 449. And we think that the contradiction is only a little more disguised, if such a contract be allowed to take the incumbrance out of the language of the deed by giving a special and unusual meaning to a covenant in

Raymond v. Russell.

daily use, the interpretation of which is as well settled as that of any words in the language. The suggestion of Mr. Justice WILDE to the contrary in *Preble v. Baldwin*, 6 Cush. 549, 553, is declared by him not to be necessary to or embraced in the decision, and is outweighed by *Howe v. Walker*, 4 Gray, 318; *Spurr v. Andrew*, 6 Allen, 420; *Harlow v. Thomas*, 15 Pick. 66; and *Townsend v. Weld*, 8 Mass. 146. Of course we are not speaking of a case which would warrant a reformation of the deed in equity, and where the facts are pleaded by way of equitable defense.

It is enough to say of *Carr v. Dooley*, *ubi supra*, and *McCormick v. Cheevers*, 124 Mass. 262, that they evidently were not intended to overrule the decision in *Howe v. Walker*, *ubi supra*, that a covenant against incumbrances would exclude proof of a contemporaneous oral undertaking of a larger scope, upon the same consideration. Moreover all three cases deal with attempts to add a further obligation to those assumed by the covenant, not with an attempt to cut the latter down. *Spurr v. Andrew* and *Harlow v. Thomas*, *ubi supra*, remain unshaken.

Exceptions sustained.

RAYMOND V. RUSSELL.

(143 Mass. 235.)

Injunction — to restrain libel.

Equity has no jurisdiction of a bill to restrain a person from publishing, in the records and books of a mercantile agency, false representations as to the business standing and credit of the plaintiff, if no breach of trust or of contract is involved.

THE opinion states the case.

W. C. Cogswell, for plaintiff.

E. W. Hutchins, for defendants.

MORTON, C. J. It is not within the jurisdiction of a court of equity to restrain by injunction representations as to the character and standing of the plaintiff, or as to his property, although such representations may be false, if there is no breach of trust or of contract involved. *Boston Dyeing Co. v. Florence Manuf. Co.*, 114

 Davis v. New York and New England Railroad.

Mass. 69, and cases cited; *Whitehead v. Kitson*, 119 Mass. 484; *Prudential Assur. Co. v. Knott*, L. R., 10 Ch. 142.

The bill before us alleges that the defendants have published, and intend to publish in the future, the name and business standing of the plaintiff in the records and books of a mercantile agency. It does not even allege that the representations are false or malicious. If he has any remedy, which we do not mean to intimate, it is by an action at law. The bill does not state a case within the equity jurisdiction of the court.

Bill dismissed.

 DAVIS V. NEW YORK & NEW ENGLAND RAILROAD.

(143 Mass. 301.)

Conflict of laws — death by negligence.

An action cannot be maintained in Massachusetts against a railroad corporation operating its road as a continuous line in that State and in Connecticut under the laws of both, for the death of a person caused by the negligence of the corporation in Connecticut, the laws of the latter State not affording the like remedy. (*See note, p. 143.*)

THE opinion states the case. The plaintiff had judgment below.

H. E. Bolles and R. M. Saltonstall, for defendant.

A. R. Brown and E. A. Alger, for plaintiff.

DEVENS, J. The defendant is a railroad corporation, operating a railroad through Massachusetts and Connecticut, as a continuous line, by virtue of the statute of 1873, chapter 289, and exists as a corporation by the laws of each of these States. This action is brought by the plaintiff, as administrator of the estate of Mrs. Ruth L. Brown, for alleged injury to her, which finally resulted in her death, by reason of the carelessness of the defendant and that of its servants, while she was being conveyed as a passenger over its railroad in Connecticut, the intestate being herself at the time in the exercise of due care.

The law of the State of Connecticut has been properly determined as a fact by the judge presiding at the trial, and his finding in regard to it is conclusive. *Ames v. McCamber*, 124 Mass. 85, 91.

Davis v. New York and New England Railroad.

From this it appears "that by the common law in Connecticut, an action for personal injuries does not survive to the administrator of the person injured; that there is no statute or law in Connecticut by virtue of which a common-law action for personal injuries is revived, or made to survive to an administrator of the person injured." The facts, as they are alleged, "do not constitute a cause of action under the laws of the State of Connecticut by the administrator in behalf of the intestate's estate, and this action could not be maintained in that State, if duly brought by an administrator there." The administrator may there maintain, upon these facts, a special action, penal in its nature, created by the statutes of Connecticut, by which the damages recoverable are limited to not more than \$5,000, and under which the damages recovered do not become assets of the estate but are recovered in behalf of certain persons not thus entitled to the same according to the laws of distribution, and are to be paid over in specified proportions to them.

The plaintiff does not contend that he may maintain this action as the special one provided by the statute of Connecticut, nor under the laws of that State. *Richardson v. N. Y. C. R.*, 98 Mass. 85. We are aware that the correctness of this decision has been called in question by the Supreme Court of the United States in *Dennick v. Railroad*, 103 U. S. 11; but it is unnecessary to reconsider our own decision, as the plaintiff seeks only to maintain his action under our statute, which provides that in case of damage to the person the action shall survive, and may thus be prosecuted by an administrator. Pub. Stat., chap. 165, § 1; *Hollenbeck v. Berkshire Railroad*, 9 Cush. 478. The inquiry is therefore presented, whether a cause of action at common law, which dies with the person in the State where it accrued, not having been made there to survive by any statute, will survive under and by virtue of the statutes of survivorship of another State, so that if jurisdiction is there obtained over the person or property of the defendant, judgment may properly be rendered against him or his property. That our statute would furnish a remedy, where the cause of action was one recognized by the law of this State as the foundation of an action at common law, although it accrued without the State, it being there recognized as existing and not discharged or extinguished, will be conceded.

It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford

Davis v. New York and New England Railroad.

a cause of action. If this is not so, a person who is not a citizen of the State, or who resorts to another State for his remedy, if jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred; and as by the law of Massachusetts it is required that a person injured while travelling upon a railroad must prove, not only the negligence of the defendant, but also that he himself was in the exercise of due care, and as jurisdiction may be obtained by an attachment of property of the defendant in another State, the plaintiff might relieve himself of the necessity of proving his own due care, if by the law of the State to which he may resort such proof is not required, and thus put upon the railroad company a higher responsibility than is imposed by the State in which it was performing its business. In a similar way, if a traveller upon a steam or horse railroad could not recover in this State for an injury done by carelessness in transporting him, because he was travelling upon Sunday, in violation of the laws of the State, he might, unless the law prescribed in this State is to govern, recover in any State where laws forbidding travelling on Sunday did not exist, if jurisdiction could there be obtained over the defendant or its property. Where an injury occurs in another State, which would be the foundation of an action at common law, and it is known that the general law of that State is the common law, it may be inferred that the transaction is governed by its rules as here applied, in the absence of evidence to the contrary; but when it is shown to be otherwise, the law of the State where the injury occurs is to be regarded. It is a general principle, that in order to maintain an action of tort founded upon an injury to person and property, the act which is the cause of the injury and the foundation of the action must at least be actionable by the law of the place where it is done, if not also by that of the place in which redress is sought. *Le Forest v. Tolman*, 117 Mass. 109; s. c., 19 Am. Rep. 400, and cases cited. It must be for the State of Connecticut to prescribe when, and under what circumstances, a cause of action shall arise against a corporation which operates a railway within its limits, by reason of an act done by it. It may provide, that for an injury done by its carelessness, there shall be no cause of action on behalf of the injured party, but punishment by indictment only, or it may give to such injured person a cause of action, and for the same injury make the corporation responsible, by indictment or other pro-

Davis v. New York and New England Railroad.

ceeding, for a fine or damages which shall go to the State, to relatives of the injured party, or to any other persons named. *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236.

The intestate did, by the common law of Connecticut, have a right of action during her life-time, but for this has been substituted, in that State, she having deceased, the penal action created by the statute.

It is the contention of the plaintiff, that the cause of action may be held to survive by virtue of our statute, notwithstanding no cause of action now exists in Connecticut. Pub. Stat., chap. 165, § 1. That the special action in Connecticut can now be maintained is not controverted. If therefore this contention of the plaintiff is correct, the defendant continues liable for its act or neglect in Connecticut by the law of Massachusetts, while it is also liable by reason of the penalty imposed upon it by the law of Connecticut as a substitute for its original liability, such penalty being still capable of enforcement. The design of our statutes of survivorship is primarily to provide for survival of those actions of tort the causes of which occur in this State. If similar statutes existed in another State, where the original cause of action accrued, it would not be difficult to hold that our own applied to such causes, upon the same principle by which we hold that the intestate herself might originally have brought her action here. When no such cause of action now exists in the State where the injury occurred, it is not easy to see how it can exist here, especially when in such State, another cause of action, growing out of the same facts, has been substituted for it. This would be to subject the defendant to two liabilities, one existing by the law of the State in which jurisdiction over person or property was obtained, but in which the accident did not occur, and the other imposed by the law of the State where it did occur, and where the defendant had his residence; while in either State the liability there imposed would be the only one to which the defendant could by its law be subjected.

It may be suggested, that the law of Connecticut, in failing to provide that an action for a personal injury shall survive to the administrator, has negatively only the same effect as a statute of limitations, which operates merely to take away the remedy of a plaintiff, while his cause of action still exists.

By the ancient common law, as it existed before Stat. of 4 Edw. III, chap. 7, which was adopted and practiced on in this State before

Davis v. New York and New England Railroad.

the Constitution, 6 Dane Abr. 687, no action *ex delicto* survived to the personal representative, the maxim *actio personalis moritur cum persona* being of universal application. *Wilbur v. Gilmore*, 21 Pick. 250. Subsequently to that statute, which was liberally construed, an action for a tort, by which the personal property of one was injured or destroyed, survived to his administrator, such tort being an injury to the property which otherwise would have descended to him. But the theory that a personal injury to an individual was limited to him only, that no one else suffered thereby, and that therefore by his decease the cause of action itself ceased to exist, continued.

While the action for personal injury is spoken of as surviving, as there previously was no responsibility to the estate, the statute creates a new cause of action. It imposes a new liability, and does not merely remove a bar to a remedy such as is interposed by the statute of limitations, which if withdrawn by the repeal of the statute would allow an action to be maintained for the original cause. What the new liability shall be, by what conditions it shall be controlled, and whether the original liability shall be destroyed, must be determined by the law of the State where the injury occurs, unless the legislation of other States is to have extra-territorial force, and govern transactions beyond their limits. We perceive no intention to invest it with such force, even if it were possible so to do.

By the decease of the intestate, the cause of action at common law which she once had in Connecticut has there ceased to exist. It is for that State to determine what provision, by action or indictment, if any, shall be made in order to indemnify the estate of the intestate, or her relatives, or to punish the party causing the injury to her. Our statute permitting the survival of similar actions in this State does not therefore apply.

The question considered in the case at bar was fully and ably discussed in *Needham v. Grand Trunk Ry.*, 38 Vt. 194, and the same result reached as that at which we have arrived. To the same effect also is *State v. Pittsburgh & Connellsville R.*, 45 Md. 41.

The plaintiff, in his argument, attaches importance to the statute of 1873, chap. 289, by virtue of which the defendant's railroad is operated in the several States through which it runs as a continuous line, but the fact that it is a corporation by the law of Massachusetts as well as by that of Connecticut cannot make its liabilities different or greater

Abbott v. Inhabitants of Cottage City.

in this State on account of transactions occurring entirely in Connecticut; nor are the rights of the plaintiff greater because his intestate, who was injured in this transaction, was a citizen of this Commonwealth. *Whitford v. Panama R.*, 23 N. Y. 465, 472; *Richardson v. New York Central R.*, *ubi supra*.

The ruling that the action could be maintained was therefore erroneous.
Exceptions sustained.

NOTE BY THE REPORTER.—The adjudications on this point, reported in this series, may be classified as follows:

1. Where the statutes in both States give the remedy. The suit is maintainable in either State. *Morris v. Chicago, etc., Ry. Co.*, 65 Iowa, 727; s. c., 54 Am. Rep. 39; *Boyce v. Wabash R. Co.*, 63 Iowa, 70; s. c., 50 Am. Rep. 720; *Leonard v. Col. St. Nav. Co.*, 84 N. Y. 50; s. c., 38 Am. Rep. 491; *Knight v. West Jersey R. Co.*, 106 Penn. St. 250; s. c., 56 Am. Rep. 200.

Contra, holding that the accident and place of suit must be in the same State: *Willis v. Mo. Pac. Ry. Co.*, 61 Tex. 433; s. c., 48 Am. Rep. 301; *McCarthy v. Chicago, etc., Ry. Co.*, 18 Kans. 46; s. c., 26 Am. Rep. 472.

2. Where the State in which the accident occurred gives the remedy, but the State where suit is brought does not. The suit is not maintainable. *Vauter v. Mo. Pac. R. Co.*, 84 Mo. 679; s. c., 54 Am. Rep. 105; *Taylor's Adm'r v. Penn. Co.*, 78 Ky. 348; s. c., 39 Am. Rep. 244.

Contra: Herrick v. Minn., etc., Ry. Co., 31 Minn. 11; s. c., 47 Am. Rep. 771.

3. Where the State in which the suit is brought gives the remedy, but the State in which the accident occurred does not. The suit is not maintainable. *Limekiller v. Hannibal & St. J. R. Co.*, 33 Kans. 38; s. c., 53 Am. Rep. 538; *Debois v. N. Y., etc., R. Co.*, 98 N. Y. 377; s. c., 50 Am. Rep. 638; *Hyde v. Wabash, etc., R. Co.*, 61 Iowa, 441; s. c., 48 Am. Rep. 320; *Willis v. Mo. Pac. Ry. Co.*, 61 Tex. 432; s. c., 48 Am. Rep. 301; *LeForest v. Tolman*, 117 Mass. 109; s. c., 19 Am. Rep. 400.

See note, 37 Am. Rep. 160.

ABBOTT V. INHABITANTS OF COTTAGE CITY.

(143 Mass. 521.)

Highway — dedication — acceptance.

Where land was dedicated for a town park, a statute or vote of the town is not essential to constitute acceptance, but proof of public use as a park for many years will suffice. (*See note*, p. 146.)

PROCEEDINGS to assess damages on taking of land for a street.
The head-note shows the point. The petitioner had judgment below.

Abbott v. Inhabitants of Cottage City.

T. M. Stetson & H. M. Knowlton, for respondent.

L. W. Howes, for petitioner.

HOLMES, J. 1. The first exception before us is to the exclusion of evidence, that from fifteen to nineteen years ago, the premises were dedicated to the public as a public square, that the dedication was then accepted by the public, but not under any statute or by vote of the town, and that public use of the premises as a park had continued down to the present time. The court ruled that no such dedication was possible in Massachusetts.

We are of opinion that this ruling cannot be sustained. The principle of dedication, although of ambiguous origin, has been recognized in this State as in force here before the statutes of 1846, chapter 203 (Pub. Stats., chap. 49, § 94), and as still in force in cases not within the terms of that statute. *Tyler v. Sturdy*, 108 Mass. 196; *Hobbs v. Lowell*, 19 Pick. 405. Notwithstanding the able opinion in *Pearsall v. Post*, 20 Wend. 111; s. c., 22 Wend. 425, so far as that tends the other way, it is now generally admitted that open squares in towns are as much within the principle referred to as highways, and it has been held in numerous decisions that such squares may be dedicated to public uses. *Commonwealth v. Fisk*, 8 Met. 238, 243; *Cincinnati v. White*, 6 Pet. 431; *New Orleans v. United States*, 10 Pet. 662, 713; *Watertown v. Cowen*, 4 Paige, 510; *Cady v. Conger*, 19 N. Y. 256, 261; *Abbott v. Mills*, 3 Vt. 521, 526; *Commonwealth v. Rush*, 14 Penn. St. 186; *Rowan v. Portland*, 8 B. Mon. 232, 248; *Methodist Episcopal Church v. Hoboken*, 4 Vroom, 13; 4 C. E. Green, 355; *Bayonne v. Ford*, 14 Vroom, 292; *Princeville v. Auten*, 77 Ill. 325; *Grogan v. Hayward*, 4 Fed. Rep. 161; 3 Kent Com. 450, 451.

The Massachusetts statute only applies to certain classes of ways, *Tyler v. Sturdy*, *ubi supra*, and we see no reason to doubt the suggestion of Mr. Washburn, that "the law remains, it would seem, as at common law, in respect to public squares and other subjects of dedication," especially in view of the fact that our statutes more than once have recognized the existence of parks "dedicated to the use of the public." Stats. 1875, chap. 163, § 1; 1877, chap. 223, § 1; Pub. Stats., chap. 54, §§ 13, 16; Washb. Easements (4th ed.) 235. See also Pub. Stats., chap. 116, § 35; chap. 27, §§ 9, 12, 50.

Abbott v. Inhabitants of Cottage City.

Of course a case could be imagined in which the square would have to be regarded as only a part of the highway. But we do not understand that there is any doubt that this is a park or square, properly so called; and it would hardly be contended that such parks and squares are within the statute of 1846. *Oliver v. Worcester*, 102 Mass. 489, 495; s. c., 3 Am. Rep. 485; *Clark v. Waltham*, 128 Mass. 567; *Veale v. Boston*, 135 Mass. 187, 189.

If there has been a dedication by the owner, it is plain that acceptance by express vote of the town in which the park lies is not necessary. But it is perhaps fair to assume that the defendant's offer of proof did not embrace any act on the part of the town, or of its officers, indicating an acceptance by it. In the case of highways, there is no doubt that an acceptance by the town must be proved. Nor has any distinction been taken between what is necessary to make the town liable for a defect, and what is sufficient to deprive the owner of his rights. *Bowers v. Suffolk Manuf. Co.*, 4 Cush. 332, 340; *Morse v. Stocker*, 1 Allen, 150, 153; *Durgin v. Lowell*, 3 Allen, 398, 400; *Hayden v. Stone*, 112 Mass. 346, 351. Compare *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540, 545.

But the requirement of such an acceptance, in this State at least, has always been put on the ground that the town is bound to repair the highway when established, and that it ought not to be subjected to that burden without its consent. *Powers v. Suffolk Manuf. Co.*, *ubi supra*. There is no such burden in the case of a public park. *Oliver v. Worcester*, *Clark v. Waltham*, and *Veale v. Boston*, *ubi supra*. And as the use is in the public at large, it is hard to see how an acceptance by the town can be declared necessary, except upon grounds which are hardly definite enough for judicial decision, however they might be regarded by the legislature. The principle laid down in *King v. Leake*, 5 B. & Ad. 469, that the refusal of a parish to adopt a way does not necessarily prevent its being public, although departed from in the case of ways, is law here when no special reason is shown for requiring the town's assent. It will be understood that we are not considering the effect of an acceptance by the town as completing a dedication, or as affording evidence that it was complete, but only whether such an acceptance is necessary to complete it.

The necessity of acceptance, in any form, of a gift to public uses has been a little over-insisted upon, perhaps, from a desire to bring

Abbott v. Inhabitants of Cottage City.

the doctrine of dedication within some more general principle of law. But apart from the considerations especially applicable to highways, which have been mentioned, it has been admitted that the so-called acceptance which is deemed necessary may be indicated by common user. *Holdane v. Cold Spring*, 21 N. Y. 474. See *Larned v. Larned*, 11 Met. 421 (before the statute of 1846); *Hayden v. Stone*, *ubi supra*; *Green v. Chelsea*, 24 Pick. 71, 80. Or as we think it better put notwithstanding the observations in *State v. Atherton*, 16 N. H. 203, 210, acceptance will be presumed if the gift is beneficial, and use is evidence that it is beneficial. *Guthrie v. New Haven*, 31 Conn. 308, 321; *Hall v. Meriden*, 48 Conn. 416. 431. The English law seems to be, that a gift to and use by the public completes the dedication. The cases do not speak of acceptance in terms, so far as we have noticed. *Regina v. Petrie*, 4 El. & Bl. 737, 743; *Healey v. Batley*, L. R., 19 Eq. 375, 392; *The Queen v. Bradfield*, L. R., 9 Q. B. 552; *Vernon v. Vestry of St. James*, 16 Ch. D. 449; *Cincinnati v. White*, 6 Pet. 440. And it is held in some States that no acceptance is necessary in order to vest the right in the public. *Methodist Episcopal Church v. Hoboken*, 4 Vroom, 21; *Hoboken Land Co. v. Hoboken*, *ubi supra*.

We have not considered whether the statute of 1882, chapter 154, should be taken to put an end to common-law dedication of parks after its passage, because the evidence might have warranted a finding that the dedication was complete before the passage of that act. It is familiar law that no particular length of time is necessary to make a dedication binding. If the petitioner's land was dedicated to the public for the purposes of a park, the fact was admissible to affect the amount of damages to be allowed for the new use of the surface. Without citing more of the innumerable cases to be found in the books, or laying down any proposition broader than is necessary for our decision, we are of opinion that the evidence offered should have been submitted to the jury.

[Minor point omitted.]

Exceptions sustained.

NOTE BY THE REPORTER. — See *Manderschid v. Dubuque*, 29 Iowa, 78; a. c., 4 Am. Rep. 196; *Buchanan v. Curtis*, 25 Wis. 99.

Evidence of the use of land for a street for many years, and that the defendant made a sidewalk on a part of it, justifies a finding of dedication, without any formal acceptance. *Pomfrey v. Village of Saratoga Springs*, 84 Hun, 607. To the same effect, *Porter v. Village of Attica*, 83 Hun, 605; *Black v. Village of Green Island*, 23 Week. Dig. 584.

Abbott v. Inhabitants of Cottage City.

"Such acceptance may be proved by long public use, or by the positive acts of the public authorities in recognizing and adopting the highway." *Cook v. Harris*, 61 N. Y. 448.

"It is not necessary that there should be any formal act of acceptance by the public authorities, but it may be indicated by common user under circumstances showing a clear intent to accept and enjoy as such the easement proposed to be dedicated." *Holdans v. Cold Spring*, 21 N. Y. 474; *People v. Lokfelem*, 102 N. Y. 1.

Dedication may be presumed from a continued use of the place for a considerable period of time as a public highway, with a knowledge thereof by the owner, and without objection on his part. *Carr v. Kolb*, 99 Ind. 55.

The same doctrine where a road, at the request of a land owner, deflected slightly from the established line, and was thus opened and worked for fourteen years. *Ryan v. Kennedy*, 63 Iowa, 87.

"Acceptance may be shown by user by the public, and by an actual assumption of care and control by the public authorities, as by grading or working upon it." "No formal act of the corporate authorities * * * is necessary." *Brakken v. Minn., etc., Ry. Co.*, 29 Minn. 41. To the same effect, *People v. Blake*, 60 Cal. 497; *State v. Sullivan*, 70 Ala. 589; *Landis v. Hamilton*, 77 Mo. 554; *Buchanan v. Curtis*, 25 Wis. 99.

But the doctrine is not predicable of unoccupied and uninclosed lands. *Herhold v. City of Chicago*, 108 Ill. 467; *Cyr v. Dufour*, 68 Me. 452.

And dedication is not established by mere user, unless for a period sufficient to establish title by prescription, and in an adverse manner. 2 Dill. Mun. Corp. (2d ed.) 641, note; *Steele v. Sullivan*, 70 Ala. 589.

In *Irving v. Ford*, Sup. Ct. Mich., April 14, 1887, it was held that merely passing or travelling over land for any length of time will not convert it into a public highway. It must have been accepted as such by the public authorities, and when the public already have a highway through a village 100 feet wide, as laid out by the United States officials originally, and sufficient for all the ordinary purposes of travel and business, the evidence to show that such highway to the width of 180 feet had been accepted must be unequivocal and satisfactory: and evidence that the houses had been built back from the original line of the road, and that sidewalks had been laid by the owners beyond the original line by order of the village, will not be sufficient. The court said:

"In order to constitute a dedication by user, or in any other manner, two things must exist: 1st, an intention, express or implied, to dedicate, that is, either a grant or relinquishment of the land to the use of the public; 2d, it must be accepted by the public authorities having jurisdiction as a public highway. It is not claimed that there was any express dedication or grant to the public of the land in question. But it is claimed that the long-continued use by the public as a highway, without objection or protest from the owners, not only implies an intent to dedicate to the use of the public as a highway, but is also evidence of its acceptance as such. A careful examination of the testimony has led us to a different conclusion. Here was a legally laid out highway, 100 feet in width, which was ample for any use the public might have through a village of 800 inhabitants, as this village was shown to con-

Abbott v. Inhabitants of Cottage City.

tain; and this fact must occupy a prominent, if not controlling, influence in the consideration of acts of user by the public, as connected with the question of widening the public highway at this point, and especially as bearing upon the question of acceptance of any additional land for highway purposes. Had the village houses in the village of Birmingham been erected upon the line of Saginaw street, no question could have been made but that the street would have been wide enough to accommodate the public. Under such circumstances, it appears to us that the mere fact that the public, or that portion thereof who had business dealings with the hotels and tradesmen of the village, have used the land in question to transact such business, cannot be taken as evidence that the public acquired any right to such land by user. There is no evidence in the case that these strips of land have ever been used for the purpose of travelling through the village, or that the travelled track of the highway was over such land. Merely passing over the land for any length of time is not alone sufficient to convert it into a public highway. It must have been accepted as such by the public authorities. And where, as in this case, the public already have a highway 100 feet in width for its use, the testimony to prove acceptance must be unequivocal and satisfactory. It would create an additional and unnecessary burden upon the corporate authorities to keep this additional width of street in repair, and subject the corporation to additional liability for neglect. The expense of constructing cross-walks over the additional width would be incurred without any additional, or even corresponding benefit to the public. We find no satisfactory testimony of acceptance by the proper public authorities of these strips of land as portions of the public highway. One witness testified to highway work having been done outside of the 100-foot limit of the Saginaw turnpike, but this is disputed. The fact that sidewalks were ordered laid by the village authorities in front of the premises by the owners would not be an acceptance. If the walks were laid by the owners upon their own private property, it would neither bind the village to an acceptance, nor affect the right of the owners to claim that the land was their private property. The walks, whether laid upon their own property, or in the public streets in front of their premises, would continue to belong to the lot owners laying them."

The defendant is the owner of lands abutting on the easterly side of the public highway. About eight years prior to the commencement of this action she set back the fence or wall on said highway in front of her premises some ten or eleven feet; and substituted, marking the same boundary or monument of her lands, where the fence or wall had theretofore stood, a row of trees as well as surveyor's stakes. The plaintiffs alleged that these acts constituted a dedication to the public of this strip of land on the side of the highway. No other dedication nor any express acceptance by the public authorities was alleged or attempted to be shown. It was by these acts alone that the fact of dedication was claimed to be proved. In place of acceptance, user by the public was alleged and relied on. We think there was nothing in the record to show that the strip of land in question was not left open for the pleasure or convenience of the owner rather than the accommodation of the public, but assuming the act of the owner to be equivocal and consistent with a dedica-

Hoxie v. Chaney — Chaney v. Hoxie.

tion to the public, it is plain there has been no acceptance on its part, nor such actual user as might take its place. The plaintiffs do not aver acceptance, and the only one of them who testifies states that he never heard of any dedication of the land. The act relied on as an act of dedication is the setting back by the defendant of her fence and placing trees on the old line. The alleged user is for a highway with her knowledge and consent. We are referred to no evidence of this and find none. An owner of land cannot by the mere removal of his fence impose upon the public a strip of land as a street, nor can the public deprive the owner of any right or interest in, or control over it, by that circumstance. Here there was nothing more. There was neither an actual gift by the owner of the land, nor a user by the public; no evidence by word, or by any decisive act of an intent even to give or dedicate, and the motion to dismiss the complaint should have been granted. *Coykendall v. Durkee*, 18 Hun, 260; *Rosell v. Andrews*, N. Y. Ct. App. Oct. 5, 1886.

HOXIE V. CHANEY.

CHANEY V. HOXIE.

(143 Mass. 582.)

Trade-mark — assignability — good-will — injunction.

The trade-mark, "A. N. Hoxie's Mineral Soap" is assignable, and if the assignee uses it to denote soap made according to A. N. Hoxie's formula, he may have an injunction to restrain infringement.

A sale of the owner's business and its good-will carries a trade-mark, but does not imply that the vendor will not re-engage in the like business at another place, but he may be restrained from representing himself as successor to the business sold or as having a right to use the trade-mark.*

BILLS for injunction. The opinion states the facts.

D. C. Linscott, for Hoxie.

W. B. French, for Chaney and Pegram.

C. ALLEN, J. The first of these cases, in the order of time, is the bill in equity brought by Hoxie against Chaney and Pegram, praying that they may be restrained from the use of the name and words "A. N. Hoxie's Mineral Soap," and "A. N. Hoxie's Pumice

* To same effect, *Bergamini v. Bastian* (35 La. Ann. 60), 48 Am. Rep. 216, and note, 233; *Myers v. Kalamazoo Buggy Co.* (54 Mich. 215), 52 Am. Rep. 812,

Soap, manufactured by A. N. Hoxie, agent," which as he alleges constitute a trade-mark, and from the use of his name in their business. The decree was to the effect that the defendants have the sole and exclusive right to use the trade-marks "A. N. Hoxie's Mineral Soap" and "A. N. Hoxie's Pumice Soap," but have no right to use words importing that the soaps are made by Hoxie personally or as agent, and have no right to use the name of Hoxie in their business. From this decree Hoxie appealed to this court, but the defendants did not appeal, and therefore no question arises in this case except as to so much of the decree as was unfavorable to Hoxie, namely, that the defendants have the sole and exclusive right to use the trade-marks.

It is conceded by both sides that these words, taken together, constituted a trade-mark; but Hoxie contends the use of his name, in the connection in which it occurs, makes them both trade-marks which are personal to himself, and which cannot be assigned. There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such cases, it would be a fraud upon the public if the trade-mark should be used by other persons, and for this reason such a trade-mark would be held to be unassignable. It is in any case a question whether the use of the trade-mark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which should contain a misrepresentation to the public. *Connell v. Reed*, 128 Mass. 477; s. c., 35 Am. Rep. 397; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. But on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade-mark which contains a person's name, and that all that purchasers would reasonably understand is that goods bearing the trade-mark are of a certain standard kind or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade-mark. In the present case, the decree shows that the court found that the use of the trade-marks now in question does not import that the soaps were made by Hoxie personally, but merely that they were made accord-

ing to his formulas; and this finding appears to be right. In *Kidd v. Johnson*, 100 U. S. 616, the trade-mark "S. N. Pike's Magnolia Whiskey" was held to be assignable. See also *Warren v. Warren Thread Co.*, 134 Mass. 247; *Sohier v. Johnson*, 111 Mass. 238; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Hall v. Barrows*, 4 DeG., J. & S. 150; *Bury v. Bedford*, 4 DeG., J. & S. 352, 369, 370.

These trade-marks became a part of the partnership property under the agreement entered into by Hoxie and Pegram, and passed to Pegram by the bill of sale executed by Hoxie to him. By the agreement, Hoxie in terms contributed the good-will of the business which he was carrying on, with the tools, implements and fixtures. A continuation of his business was plainly contemplated; and in point of fact the trade-marks were used by the firm during the whole continuance of the partnership. The bill of sale is not controlled in its terms by any facts proved. There were negotiations looking to a retransfer to Hoxie of his interest in the partnership, at the close of the ensuing fishing season; but nothing was arrived at. Hoxie had violated the terms of the partnership agreement in several important particulars, which naturally led to Pegram's insisting on a dissolution. Under these circumstances, the bill of sale was signed, with no agreement, either written or oral, to take Hoxie back as a member of the firm. By it Hoxie sold to Pegram "the following goods and chattels, namely: All my right, title and interest in and to all and singular the partnership property belonging to the firm of A. N. Hoxie & Co. (consisting of A. N. Hoxie and Frank R. Pegram), meaning hereby to sell and convey to said Pegram all my interest in the entire assets of said firm, wherever the same may be situated." These terms are broad, and although the trade-marks and the good-will of the firm are not expressly mentioned, both are included within its meaning. *Sohier v. Johnson*, 111 Mass. 242, 243; 2 Lindl. Part. (4th ed.) 860, 861, 1046; *Shipwright v. Clements*, 19 W. R. 599. Pegram therefore became the owner of the trade-marks, and his firm of Chaney and Pegram are now entitled to their exclusive use.

The decree of the court in this case is affirmed.

Decree affirmed.

The second of these cases is the bill in equity brought by Chaney and Pegram against Hoxie, and it proceeds on the ground that

the exclusive right to use the trade-marks had become of great value; that by the agreement of partnership with Hoxie, and the bill of sale from Hoxie, Pegram had become the owner of them, with the good-will of the business; that Hoxie has now opened a soap factory and is manufacturing the two kinds of soap, and is putting them up in wrappers bearing the trade-marks, and has issued circulars and cards using and availing himself of the trade-marks. The prayer is for an injunction to restrain Hoxie from making and selling said two kinds of soap, from using the wrappers bearing the trade-marks, and from doing other acts tending to injure and impair the good-will of the business. The decree, after affirming Chaney and Pegram's ownership of the trade-marks, was in substance, that Hoxie ought not to interfere with or compete with them in the business of making or selling mineral or pumice soap in Boston, and ought to be enjoined from using the trade-marks, or any imitations thereof, and also from competing with and from endeavoring to disturb or interrupt the business of said Chaney and Pegram in the manufacture and sale of said soaps; and that injunctions should issue accordingly.

So far as the ownership and use of the trade-marks are concerned the decree should be affirmed. But in reference to what is involved in the transfer of the good-will of the business it requires some modification. Neither the agreement of partnership between Hoxie and Pegram, nor the bill of sale from Hoxie to Pegram, contained any agreement that Hoxie, upon a dissolution of the firm, should not carry on a similar business, further than is implied by the transfer of the good-will, pure and simple. The general rule in this Commonwealth, as applicable to the sale of stock in trade in a particular store, and of the good-will of the vendor's trade and all the advantages connected with such place of business, is that such a sale does not import an agreement by the vendor not to engage again in a similar business in some other places at a subsequent time. *Bassett v. Percival*, 5 Allen, 345, 347. The court say: "Whenever such is the intent of the parties, it is carried into effect by an express stipulation which if not in undue restraint of trade, may be valid and binding. But we know no case where any such agreement has been raised by mere implication, arising from the sale of the good-will of a person's trade, in connection with a particular place of business where it has been carried on. There may be cases and circumstances where it will be difficult to tell just

Hoxie v. Chaney — Chaney v. Hoxie.

how much is included in a sale merely of the good-will of a business. Such difficulties might exist where the business is not local in its character, but extends over a considerable region or line of travel; as for example, in the case of a carrier, an express company, a canvassing agency or a newspaper. But it is not necessary at this time to enter upon the consideration of such cases. In the present case, there is nothing in the averments or proof to show that the business of Chaney and Pegram was carried on by means of travelling agencies, or that Hoxie has directly or personally solicited customers of Chaney and Pegram to leave them and to buy of him; and the case falls within the doctrine of *Bassett v. Percival*, above cited.

It is proper to refer to the distinction which exists between *Bassett v. Percival*, and several later cases. In *Angier v. Webber*, 14 Allen, 211, arising about four years later, in which the opinion of the court was delivered by Chief Justice BIGELOW, who also delivered the opinion in *Bassett v. Percival*, the sale was of the good-will of a teaming business in Boston and between Boston and Somerville, with a special agreement not in any manner to do any thing which should in any wise impair or injure the good will. This was a business which was done on the road, and all along the line between two cities. In *Dwight v. Hamilton*, 113 Mass. 175, the defendant's "practice and good will as a physician" was sold, with the land and buildings where he lived, and from the nature of the good-will and practice of a physician, the case was said to be clearly distinguishable from *Bassett v. Percival*, and to resemble *Angier v. Webber*. In *Munsey v. Butterfield*, 133 Mass. 492, the plaintiff agreed to sell certain articles of personal property used in the milk business, "also the good-will of said Munsey's milk route lying in West Somerville, East Somerville, North Somerville and Charlestown;" and before completing the transaction, the plaintiff bargained with another person to buy a milk route which ran over a portion of the same territory in Charlestown and Somerville as the route which he had sold to the defendant; and the defendant having refused to complete the purchase, this was held to fall within the same rule as *Angier v. Webber* and *Dwight v. Hamilton*. All of these later cases rest upon the peculiar character of the good will which was the subject of sale, and neither of them in the matter decided disturbs the decision in *Bassett v. Percival*, which also is in accord with most of the recent decisions elsewhere, so far

Hoxie v. Chaney — Chaney v. Hoxie.

as they have come under our observation. See *Pearson v. Pearson*, 27 Ch. D. 145, where the late English decisions are reviewed. *Cottrell v. Babcock Printing Press Co.*, 54 Conn. 122; 2 Lindl. Part. 859 *et seq.*

In the circular headed "Special Notice to the Wholesale and Retail Trade," Hoxie virtually represented himself as the successor to the business, the good-will of which he had sold, and also asserted a right to the trade-mark. This was in excess of what he could lawfully do. *Churton v. Douglas*, Johns. Eng. 174.

Inasmuch as there is nothing in the averments or proof which shows any undue or unlawful interference or competition, on the part of Hoxie, except in respect to the use of the trade-mark on wrappers and in circulars and otherwise, and the virtual representation of himself as the successor to the business of the old firm, the decree in the second case should be modified, by inserting a specification that he is not to interfere or compete with the business of Chaney and Pegram, "by representing himself, either directly or by implication, as the successor of the late firm, or as doing the same business that was done by them;" and the decree is affirmed in respect to the use of the trade-marks, and in other respects.

Decree accordingly.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. BRIGHT.

(35 La. Ann. 1.)

Municipal corporation — power to punish disobedience of ordinances.

A city has no power to punish disobedience of its ordinances by fine, imprisonment or other penalty, unless it is expressly granted by its charter.

THE opinion states the case.

Walter H. Rogers, city attorney, for appellee.

Geo. L. Bright, for appellant.

BERMUDEZ, C. J. The question presented in this controversy involves the power of the city of New Orleans to enforce, by fine and in default of payment of such, by imprisonment, compliance with the requirements of an ordinance relative to the establishment of an uniform grade for all sidewalks, within corporate limits.

The defendant, who was prosecuted for such non-compliance, appeals from the judgment rendered against him.

The ordinance (No. 749, A. S.) reads as follows:

“Resolved, That an uniform grade shall be established for all sidewalks within the corporate limits of this city, and that the owners of all property, fronting any public alley or street shall, at

their own expense, cause their sidewalks to be made in conformity to said grade, within ten days after the same shall have been established by the city surveyor, and notice served by the commissioner of public works, upon the owner, agent or tenant of said property. Any owner of property, who shall fail to cause said sidewalk to be so graded, after due notification and within ten days thereafter, shall be subject to a fine of not less than twenty-five dollars for each offense, and in default of payment of said fine, to imprisonment for a period of not less than thirty days, or both at the option of the court; said fine or imprisonment to be imperative, and to be enforced by any court of competent jurisdiction."

It is claimed, on the one hand, that the right to provide for a uniform grade for all sidewalks within corporate limits, and to enforce compliance with the regulations on the subject, is vested in the city, not only by her charter, but also by the police power with which she is necessarily clothed as an indispensable, inherent prerogative, essential for her existence and maintenance.

On the other hand, it is urged that the city possesses no such right, for the reasons that it was not conferred by the charter and that it is not inferable from such police power.

It is further pressed, that if the city has the right to provide for the grade of sidewalks, such power cannot be delegated to the city surveyor, and that the observance of regulations on that subject cannot be coerced by fine and in fault of payment by imprisonment.

It is needless to inquire and determine whether the city authorities have the right, either under the charter or the prerogative attaching to the exercise of the police power, to provide for a uniform grade for all sidewalks within corporate limits and whether this right was or not delegated to the surveyor.

If it be true as claimed, that the city has no right to enforce an ordinance to accomplish that object by fine, and in default of payment by imprisonment, it follows that the ordinance in this case would be clearly unwarranted and illegal in that respect. This would suffice to render it inoperative and to relieve the defendant from the effect of the judgment from which he has appealed.

It is a principle which cannot be controverted, that a municipal corporation, which is the creature of the law and a State functionary, can exercise only those powers which have been expressly delegated to it, and which are necessarily implied as inherent to its

State v. Bright.

existence and thus absolutely indispensable for its administration and maintenance in the accomplishment of the functions for which it was put in being and given life.

It is therefore acknowledged by text-writers, supported by abundant authorities, that a municipal corporation has no right to enforce obedience to ordinances which it has the power to pass, by fine or imprisonment, or other penalty, unless that right has been unquestionably conferred by the law-giver; for this is inflicting a punishment for the commission or omission of an act declared an offense, a prerogative which as a rule appertains to the sovereign only. Dill. Mun. Corp., § 336, p. 343; § 353, p. 353; Desty Tax., p. 765.

We have carefully examined the sections of the charter (act 20 of 1882) of the city (§§ 7 and 8), and have failed to discover in them any delegation of such right for non-compliance with ordinances relative to streets or sidewalks.

The words "shall provide for the punishment of any violation of such ordinances or regulations, by fine or imprisonment," found in section 7, refer to ordinances which the common council is authorized to pass and have executed, as may be necessary and proper to preserve the peace and good order of the city and to maintain its cleanliness and health.

Those words, under no circumstance, even in the case stated, would justify the city in imposing a fine, and in default of payment in imprisoning the transgressor, as was done by the ordinance attacked in this instance.

For those reasons it is ordered and decreed, that the judgment appealed from be reversed; and it is now ordered and decreed, that the prosecution be dismissed and the defendant discharged from the claim against him.

In holding as we do, we make no reflection on what right the city may have to enforce otherwise compliance with such ordinances.

Judgment reversed.

STATE V. JUDGE OF CIVIL DISTRICT COURT.

(28 La. Ann. 48.)

Municipal corporation — disobedience to mandamus — contempt.

When a city council has been ordered by *mandamus* to pay a debt, and refuses obedience, the members voting against the payment are guilty of contempt. (*See note, p. 161.*)

APPPLICATION for *certiorari* and prohibition. The opinion states the case.

Walter H. Rogers, city attorney, for relators.

Todd, J. On the 5th of June, 1885, Herman Newgass, a creditor of the city of New Orleans, applied for and obtained a peremptory *mandamus* against the city council and the members thereof to provide for the payment of his claim.

Eight members of the council refused to obey the writ. The claim had been placed on the budget, and the finance committee had reported an ordinance directing its payment, but the eight members above referred to voted against the ordinance for its payment and by their vote defeated its passage, and at the same time signified their disobedience of the order requiring provision to be made for its payment.

Thereupon under a rule taken, the members of the council, thus refusing obedience to the *mandamus*, were adjudged guilty of contempt by the judge who issued the writ, and were each sentenced to pay a fine of \$50 and to be imprisoned in the parish jail for ten days.

They complain of this action of the judge, and have applied to this court for writs of *habeas corpus*, *certiorari* and prohibition, under which they seek to have the sentence set aside and annulled.

It is almost needless to say that the writ of *habeas corpus*, being only authorized in aid of the appellate jurisdiction of this court, we cannot consider it, and must confine our attention to the other relief sought.

1. The relators first contend that the proceeding for contempt was wholly unauthorized in this case, and that the party aggrieved by the non-action of the relators in the premises had his remedy

State v. Judge of Civil District Court.

under article 636 of the Code of Practice, providing in certain cases for the enforcement of judgments by writs of *distringas*.

In our opinion, that article is wholly inapplicable to the matter in hand. It relates to judgments and decrees rendered in the ordinary course of judicial proceedings, and not to peremptory orders issued in summary proceedings requiring or prohibiting the performance of some specific act.

The thing ordered to be done by the relators in this instance was the performance of a purely ministerial duty imposed upon them by law, that is, to provide for the payment of a just claim against the city, and already placed as such on the budget of city expenditures.

Under the law and the peremptory terms of the mandate addressed to them by a judge clothed with full jurisdiction over the subject, they were vested with no discretion in the matter, their plain duty was to obey the law and the writ.

Courts would indeed be comparatively powerless, and the administration of the law and of justice utterly inefficient and worthless, if judges possessed not the authority to enforce obedience to their legitimate orders by the process and means herein complained of.

2. The second contention of the relators is, that the process for contempt should not have been levelled alone against the members refusing obedience to the *mandamus*, but directed against the city of New Orleans or all the members of the council.

There is no force in this proposition. Dillon, in his able work on *Municipal Corporations*, vol. 2, p. 876, in discussing the identical subject now before us says: "The writ, although directed to the corporation, is enforced through the members or officers whose duty it is to obey its commands, and if part of the officers or members have done all within their power to comply with the writ, the court will punish only those who are actually guilty of disobedience;" and this doctrine is placed beyond controversy by the decision of the Supreme Court of the United States in the case of *Board Commissioners of Leavenworth v. Sellow*, 99 U. S. 623, 624. The decision is in accord with several others rendered by the State courts. 2 Metc. (Ky.) 156; 15 Wis. 37; 65 N. C. 114; 19 Wend. 68; 13 Fla. 451.

It is therefore ordered, adjudged and decreed, that the restraining order heretofore rendered be set aside, and the application for the relief herein sought be dismissed at the cost of the relators.

Application dismissed.

FENNER, J., concurred upon the absence of any ground for the exercise of supervisory jurisdiction; BERMUDEZ, C. J., and POCHE, J., dissented on the ground that the proceedings should have been against the whole council.

BERMUDEZ, C. J., said. "The mandate not having been complied with by the board, all the members are delinquent and the aggrieved party has no right to judge and determine which of those members are or not guilty of contravening the peremptory command.

"The proceeding should be directed, not against certain members singled out, but against each and all, in order that they respectively might show cause why they should not be punished for contempt.

"The councilmen who abstained from attendance may be as guilty as those who obstructed obedience, for it was their duty to be present and carry out the instructions of the court.

"It is by their appearance on the rule for contempt and their defense, that the guilt or innocence of each and all is to be determined by the court.

"If in the course of the proceedings it appear that some members have done all in their power to comply with the judicial command, they must be exonerated; but if on the other hand, it is established that other members whose concurrence was indispensable, have not given it, either by acting in direct opposition or by omitting to act, the penalty attached to disobedience should be visited alike upon all who are recreant, for they were left no alternative. They are not called upon to determine whether the thing ordered shall or not be done; but they are commanded to do it, unconditionally."

POCHE, J., said: "The fact that eight negative votes were sufficient to defeat the passage of the ordinance shows conclusively that several members of the council were absent; for if all the members had been present and had voted, the result would have showed twenty-two affirmative votes, and the ordinance would thus have been passed, and the relator in the *mandamus* case would have no right to complain. Under that state of the case, the court would have been powerless to proceed against the members who have cast the negative votes. The purpose of its mandate would have been accomplished, and its power over the subject-matter would have been exhausted.

State v. Judge of Civil District Court.

"Whence does the judiciary department derive its power to single out a few component parts of a legislative functionary, and to hold them in contempt for their votes? Conceding the power of courts to punish a board of commissioners or a municipal council for disobedience of the mandates of a competent tribunal, it is plain that the proceeding or *mandamus* cannot be directed to the persons composing the board or council, but the process must be addressed to the body as a unit.

"These views are supported not only by reason and logic, but by most respectable authority. *State v. Smith*, 19 Iowa, 334; *Board of County Commissioners of Leavenworth Co. v. Sellers*, 99 U. S. 624.

"The absolute illegality of the process for contempt against the relators herein is further demonstrated by the following consideration: the rule is settled that courts cannot take judicial cognizance of municipal ordinances, which must be alleged and proved in order to be judicially considered or enforced, *a fortiori* courts cannot take judicial notice of the particular votes cast in a council meeting by each individual member of the body. The manner of their voting can only be proved or considered in contradictory proceedings and not *ex parte*.

"Hence the process must of necessity issue against the whole body, as the only mode by which the individual members who have refused obedience to the *mandamus* can be reached and properly dealt with."

NOTE BY THE REPORTER.—In *Maddox v. Graham*, 2 Metc. (Ky.) 56, it was held that *mandamus* would lie to compel a city council to levy and collect a tax. The court said: "It may assume the character of an individual proceeding, if it becomes necessary to enforce the orders of the Circuit Court by attachment or other process for contempt."

The same general doctrine was declared in *Soutter v. City of Madison*, 15 Wis. 30; *Pegram v. Commissioners*, 65 N. C. 114; *County Com'rs v. King*, 13 Fla. 451.

On the point of the contempt, Dillon says (Mun. Corp., § 881). "Where the writ is directed to the corporation by name, the attachment should issue against the guilty only, not against those who do all in their power to obey the command of the writ." "Obedience to the peremptory writ is enforced by attaching the persons guilty of the disobedience for contempt." Citing *Com v. Taylor*, 36 Penn. St. 263.

In *First Cong Uchurch v City of Muscatine*, 2 Iowa, 69, the court said: "A proceeding for contempt is necessarily personal, that is to say, the corporation, as such, cannot be imprisoned for contempt. But those acting in and of it, violating the injunction, may."

Hanson v. Mansfield Railway and Transportation Company.

HANSON V. MANSFIELD RAILWAY AND TRANSPORTATION COMPANY.

(36 La. Ann. 111.)

Carrier — railroad — passenger riding on engine of freight train.

One who by permission of the engineer of a freight train, acting as conductor, takes passage on such train and pays fare, is entitled to the privileges of a passenger, although the engineer has been forbidden to receive passengers on the train, provided the passenger does not know of such rules.

It is not negligent in such passenger to ride on the locomotive by direction of the engineer-conductor.

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

J. M. Cunningham and J. S. Young, for appellant.

C. W. Pegues and J. C. Pugh, for appellee.

TODD, J. This case was argued and submitted at the recent term of this court at Shreveport, and it was agreed that it should be decided at this place.

The plaintiff, as the tutor of his minor son, Charles Hanson, sues the defendant company for damages on account of personal injuries caused the latter by the explosion of the boiler of a locomotive, used on the company's road, and charged to have resulted from serious defects in the boiler, and the gross negligence of the engineer in charge of it.

The answer is, substantially, a general denial, coupled with an allegation of contributory negligence on the part of plaintiff's ward, which it was averred relieved the company of any liability for the alleged injury.

There was judgment for the defendant and the plaintiff has appealed.

The facts are substantially these:

The defendant's railway, known as the Mansfield Transportation road, extends from the town of Mansfield to its junction with the Texas and Pacific railroad, a distance of nearly two miles.

At the time the casualty is alleged to have occurred, the company ran two passenger trains and two freight trains over the road daily.

Hanson v. Mansfield Railway and Transportation Company

On the 18th of January, 1883, Charles Hanson, a youth of about seventeen years of age, went to the depot of the company in the town of Mansfield, for the purpose of procuring a passage for himself to the aforesaid junction. There was a freight train at the depot, consisting of two cars which were loaded and locked. It was some hours before the passenger train would leave. Not wishing to wait, he spoke to the engineer and asked if he could go down with him to the junction. Permission was granted, and the engineer assigned him, together with a lady passenger, seats in the cab of the locomotive. This cab is described as a space three feet by four, where wood was stored for the running of the engine and for the accommodation of the engineer and fireman.

There was an order of the company against taking passengers on the freight train, but no notice of this order was posted at the depot or elsewhere, and young Hanson was not shown to have been cognizant of it. On taking the seat assigned him, the usual fare was demanded and paid to the engineer. There was no conductor on the train, the engineer being in sole charge. It was stated on the trial by one of the directors, quoting his language, "when there is no conductor on a freight train the engineer controls it in the running of it."

It appears that occasionally passengers were received on the freight trains, as in this instance, and sometimes paid their fare and sometimes did not.

After Hanson had been seated in the cab a short time, having had, it seems, some experience with steam engines, he noticed or discerned that the water was low in the boiler; he called the engineer's attention to the fact and told him that there was something wrong, and rose to get off the train, when the engineer laid his hand on his arm and told him there was no danger and that he knew what he was doing, and at that instant, as we construe the testimony, the explosion took place. By it the engineer and the lady passenger and the brakeman and fireman on the car in the rear were killed, and Hanson seriously injured. He was senseless for several hours, had several gashes on his head, was badly scalded about the face and neck, and his collar bone broken. He suffered great pain from his wounds, was confined to his bed for nearly a month, and could neither speak nor see for several days. Though able to resume his work — being a telegraph operator, his sight remained somewhat impaired; there is a deformity in one of his

Hanson v. Mansfield Railway and Transportation Company.

shoulders, it being lowered from its normal position, and his sleep is disturbed by fits of nervousness and fright—alleged consequences of the shock he received.

1. The first question to be considered is whether the explosion was caused by negligence on the part of the company or any of its officers or agents.

2. The next inquiry is whether the plaintiff's son was a passenger and entitled to the privileges and protection extended to passengers on railroad trains, under the state of facts above set forth.

This is a question that admits of much discussion, and one in which the authorities are not entirely harmonious. We have diligently examined these authorities and have reached the conclusion that they greatly preponderate in support of the proposition, that in this instance the plaintiff's son stood in the relation of a passenger to the company.

He was either a passenger or a trespasser on the train. He could not reasonably be held to be the latter, in view of the fact that he boarded the train by permission of the engineer then acting conductor and having sole charge of the train; that he was assigned a seat by him; that he paid him the usual fare—and moreover that his case was not an isolated one, but that he, the engineer, occasionally, if not habitually, received other persons on the freight train and assigned them at times the place to which Hanson was directed; and that at that very time he received a lady on board the train who by his direction, occupied the same cab or seat with Hanson.

But it is urged that there was an order of the company, that persons should not be permitted to ride on the freight trains, and the engineer was forbidden to receive them. In the absence of the proper notice of such order, by being posted at the depot or otherwise, brought to the attention of the public, it remained a regulation solely between the company and its employees, and could have no effect upon the right of passengers, or the responsibility of the company.

Rorer, who is justly held as high authority on this subject, in his work on Railroads, p. 1113, thus discourses on this point: "Where freight trains, or some of them, are accustomed to carry passengers for pay, and a passenger enters a freight train to be carried for pay, though he may have no ticket and though the course of such trains as to carrying passengers may, as between the employees thereon and the company, be such that passengers

Hanson v. Mansfield Railway and Transportation Company.

are not allowed thereon, yet such person, if ignorant thereof, is entitled to be regarded as a passenger, and if injured the company is liable."

The author cites among other cases in support of this doctrine that of *Lucas v. Milwaukee Railroad*, 33 Wis. 41; s. c., 14 Am. Rep. 735. In that case a person went to the depot and found the ticket office closed and a freight train about starting. He went aboard this train by consent of the conductor, who had been forbidden to take passengers on such trains, and it was held that he was a passenger; and in so holding and in discussing this question of persons boarding freight trains, where the company was not in the habit of carrying passengers on such trains, the court used this language: "Especially will this be so if they are directed to go aboard by the conductor, although such conductor has in fact no such authority from the company for that purpose."

A leading case on this point is that of *Dunn v. Grand Trunk Railway*, 58 Me. 187; s. c., 4 Am. Rep. 267, from which we quote as follows:

"If a passenger enters the caboose car of a freight train, and when the train starts, without being requested to leave, remains there as passenger, contrary to rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger car."

And again: "Every one riding in a railroad car is *prima facie* presumed to be there lawfully as a passenger having paid his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser * * * That the regulations of the defendant are binding on its servants. Passengers are not presumed to know them."

To the same effect are 93 U. S. 291; 14 How. 486; 1 Duer, 578; 20 Minn. 125, 126; 43 Ill. 364; 1 Am. and Eng. R. Cases, 257.

The learned judge of the District Court in his reasons for judgment cites approvingly the case of *Eaton v. Delaware R. Co.*, 57 N. Y. 382; s. c., 15 Am. Rep. 513, as opposed to the above authorities.

In that case the conductor of a coal train invited some boys to ride upon the train to a certain point, promising them employment. There was a printed regulation forbidding persons from riding on the train. It did not appear that passengers were ever allowed to

Hanson v. Mansfield Railway and Transportation Company.

ride thereon, and no fare in that instance was paid or demanded. In such features it differs from the instant case. Thompson in his work on Carriers, p. 344, thus comments on that case :

"The foregoing decision (*Eaton v. Del. R. Co.*) is strictly in accord with the circumscribed views of the courts of the State of New York, in regard to the scope of a servant's authority and the immunity of the master from liability for the results of acts for the doing of which the servant was not hired. But as courts in general are not disposed to thus limit the responsibility of the master for the acts of his servant, it will not be surprising to find that a contrary opinion is entertained upon this question. Thus the Supreme Judicial Court of Maine, in *Dunn v. Grand Trunk R. Co.* have held," and quotes from the decision, and adds, "to the same effect is the decision of the Supreme Court of Pennsylvania, in the late case of *Creed v. Penn. R. Co.*, 86 Penn. St. 139 ; s. c., 27 Am. Rep. 693. These last two cases would seem to express the better view of this question, and they have the support of authority in analogous cases."

Under these circumstances we cannot accord the same weight to that decision that was given it in the court below.

3. This being as to the question of contributory negligence.

This is charged to have consisted in Hanson boarding the freight train and taking a seat in the cab of the locomotive; and again his failing to leave the train on discovering the condition of the boiler or the low state of the water therein.

Much that we have said upon the question of his being a passenger will apply to the first branch of this inquiry, as to whether his acts in the premises, as stated, constituted negligence *per se*.

This court in the case of *Knight v. Pontchartrain R. Co.*, 23 Ann. 462, has laid down rules of contributory negligence, which we find have been quoted and approved as sound by Rorer in his work mentioned, page 1039.

These are substantially :

1. "Where the conduct of plaintiff has, as a matter of fact, contributed to the accident, but such conduct has not been in a legal sense imprudent or negligent. In such case plaintiff may recover from a defendant in fault.

2. "Where the conduct of plaintiff has been negligent or imprudent, but has not contributed to the accident. In such case the plaintiff may recover from defendant in fault.

Hanson v. Mansfield Railway and Transportation Company.

3. "Where the conduct of plaintiff has been negligent and has contributed to the disaster. In such case the plaintiff cannot recover, even though the defendant be in fault."

It is not easy to perceive how, by any reasonable application of any one of these rules to the facts of this case, or of the facts to the rule, the plaintiff could be considered as debarred from the right of recovery.

It is certain that the defendant was in fault with regard to this explosion which caused the injury, and that the fault of the company in providing a defective engine, and the fault of the engineer in not keeping a sufficient supply of water in the boiler, were the immediate and direct causes of the disaster.

It cannot be said that the plaintiff, by any act or omission, contributed to produce the explosion of the boiler, or that he, in any manner, contributed to the injury he sustained, unless indirectly and remotely by being on the train and in the place he occupied thereon. And if his presence there could be held as any kind of contributory negligence, he could not, under any rule or principle of law, be held guilty of negligence in a legal sense.

Negligence, in its common acceptation, is held to be the doing of something that a reasonable and prudent person would ordinarily not have done under the circumstances of the situation, or the omission to do something which a person of like character would have done under the circumstances of the case.

We incline to the belief that most any man of average prudence, situated as Hanson was at the time, would have acted just as he did in this instance. The road was a short one, less than two miles; he went on the train by permission of the person in charge of it, and took the place assigned him thereon; as an employee of a telegraph company he had often occupied a similar place on a train without harm.

Leaving out for the moment the question of an explosion, the only increased danger that would naturally suggest itself to his mind incident to his position on the engine, and that he would not be equally exposed to on a passenger train, was such as might result from a collision with another train or that of being shaken or jolted off from the rapid running of the train or meeting an obstruction on the track.

As to the danger from an explosion, he was just as safe where he was as he could be elsewhere on any kind of a train; provided the

State v. City of New Orleans.

engine was sound and the engineer did his whole duty, and he had a right to expect a sound engine and a competent and careful engineer; and it argued no negligence on his part that he rested in security on this presumption.

And in this connection we may add, that as before stated, the proximate causes of this disaster were an unsound engine and the negligence of the engineer, and there is a high authority to support the proposition that to defeat a recovery on account of contributory negligence, such negligence must be the proximate cause of the injury. 8 Am. and Eng. R. Cases, 480, citing *Fowler v. B. & O. R.*, 18 W. Va. 579; *Blaine v. Chesapeake, etc.*, *R. Co.*, 9 W. Va. 253; *Sheff v. City of Huntingdon*, 16 W. Va. 307.

It has also been frequently held, that taking an unusual place on a train, which ordinarily might be considered contributory negligence, cannot be so regarded when the place is occupied by the direction or a permission of the conductor.

Thus where he goes on the car-platform, 32 Barb. 397; 27 Ind. 29; 38 Ga. 409; or in the baggage car, 59 Penn. St., 239; 1 Duer, 571; 20 Minn. 125; or on the engine, *Nashville & Chat. R. Co. v. Erwin* (Tenn.), cited in 3 Am. and Eng. R. Cas. 465; see also, 1 Am. & Eng. R. 82, citing *Ky. R. v. Thomas*, 50 Mo. 139; 36 N. Y. 135; 3 Head, 638; 14 How. 468.

[Omitting other matters.]

Re-hearing denied.

STATE V. CITY OF NEW ORLEANS.

(28 La. Ann. 119.)

Constitutional law — impairing contract.

A judgment for the repayment of money paid by mistake is not upon contract, and is not protected by the Federal constitutional provision forbidding the enactment of laws impairing the obligation of contracts.*

THE opinion states the case.

Fred. D. King and *Blanc & Butler*, for appellee.

W. H. Rogers, city attorney, for appellant.

* See *McLure v. Melton*, post.

BERMUDEZ, C. J. The relator, who is a judgment creditor of the city, claims that an appropriation be made and revenue provided for his benefit in the next budgets or tax and revenue levies of the city, and in all future budgets and levies, until he be fully paid in capital, interest and costs.

He charges that the judgments in his favor have, as their consideration, amounts paid for licenses illegally exacted prior to 1874; that the obligation of the city to reimburse springs from a contract and cannot be impaired by the State; that the rate of taxation at the time was fixed at twelve and one-half mills, which would have sufficed, but that the same has been since reduced to ten mills.

He further argues, that if his claim is not based on a contract, the obligation of which cannot be impaired, he is entitled to be paid out of part of the ten mills, only nine-tenths of which constitutes the alimony of the city, the remaining tenth the reserve fund, not forming part of it and being a municipal asset out of which he can be satisfied.

The defense is that the judgments are not based on contract obligations; and that the same are payable only out of the usual and ordinary municipal revenues, which are limited to ten mills, which are necessary for the alimony of the city.

From an adverse judgment the corporation has appealed.

No principle is better recognized by law and jurisprudence than that he who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it, and that he who has thus paid through mistake, believing himself a debtor, may reclaim what he has paid. R. C. C. 2301².

This principle governs both natural and artificial persons.

It does not however follow that the right to claim reimbursement and the obligations to refund arise from a contract, express or implied, which is protected from impairment or invasion by the Constitution of the United States, which is invoked as a shield in the present controversy.

The contracts designed to be protected are such by which perfect rights, certain, definite, fixed private rights, are vested. *Butter v. Penn.*, 10 How. 402.

There is a distinction between those rights which the law gives to, or obligations which it imposes upon persons in certain relations, merely in carrying out its own views of policy and independent
Vol. LVIII — 22

ently of any stipulations which the parties may have made, and those rights which the law itself, even in carrying out some matter of general policy, authorizes to be made the subject of express contract between the parties.

In the former case, the rights being entirely derived from the law and not from the contract, laws changing them are not within the prohibition; but in the latter case, although the law authorized the rights to be acquired, yet it authorized them to be acquired only by contract and when thus acquired the contract is within the pale of the protection.

"The doctrine of implied municipal liability," says Mr. Chief Justice FIELD, in a California case, invoked by relator, and which was subjected to a thorough examination, "applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same.

"If the city obtain money by mistake, or without authority of law, it is her duty to refund it, not from any contract, entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial," etc.

The obligation to refund the money illegally received by the city, for the licenses subsequently declared to be illegal, does not arise from any contract between the city and the parties paying, any more than does the obligation to repair damage caused by the fault of another.

In the case of *Fblsom v. New Orleans*, 32 Ann. 714, decided by the present court, whose conclusions were affirmed by the Supreme Court of the United States, we had occasion to review fully the principles and the jurisprudence on the question of the protection which the Federal Constitution awards to contracts by prohibiting States from impairing the obligations of the same, and following in the line of well-established precedents, we held that the right to claim damages, occasioned by the commission of a tort, even when reduced to judgment, did not arise from a contract and was not therefore within the constitutional protection.

We further declared that a State Constitution, when it does not conflict with that of the United States, is omnipotent in its disposition and even destruction of private and social rights, and that a State may divest vested rights, without infringing the paramount law of the land.

Williams v. McManus

It is manifest in the case at bar, that as the right to claim reimbursement does not arise from any contract, but is recognized by law only, the relator has vainly invoked the constitutional protection.

[Omitting other matters.]

Rehearing denied.

WILLIAMS v. McMANUS.

(38 La. Ann. 161.)

Slander — drunkenness — apology — one not participating in provocation.

Drunkenness or an unaccepted apology is not a defense to slander.

Provoking acts are no defense to slander of one who did not participate in them.

SLANDER. The opinion states the case. The plaintiff had judgment below.

M. and Jno. C. Ryan, for appellee.

R. J. Bowman, for appellant.

BERMUDEZ, C. J. The defendant appeals from a judgment, based on the verdict of a jury, sentencing him to pay to the plaintiff \$2,500 damages, for slandering her.

The charge is that the defendant publicly denounced the plaintiff, on the streets of Alexandria, in the hearing of a number of witnesses, as a damned whore, her daughters as damned sluts, and her sons as bastards; that these epithets were repeated at least half a dozen times; that they are false, willful, malicious and slanderous; that they were uttered without cause, and have injured the good name and character of plaintiff.

The defendant, after a general denial, answered that if he used any such epithets, he has no recollection of it; that at the time he was so intoxicated as to be utterly unconscious of anything he said or did; that when informed of the charge, he offered an apology which was declined; that he was not actuated by malice; that if he uttered the epithets, they were the mere ravings of one too intoxicated or insane to know what he was doing.

The defendant specially denies that the plaintiff or her daughters were or could be defamed by the said insane ravings and that so far as their fair name is concerned, no one is more ready to admit, or to sustain it, than himself.

In an action of this character, the only possible defenses are, either a denial, or a justification, or a confession, under mitigating circumstances. R. S. 3640; 14 Ann. 406; 15 Ann. 166; 36 Ann. 469.

The answer includes them all. It equivocates, and is utterly inconsistent. 10 Ann. 231; 28 Ann. 238.

There is no such thing in law as a half-way justification. Towns. Lib. and Sland., § 212 and note (2d ed.).

The defendant has not at all undertaken to justify his conduct. He pleads exoneration from liability, because at the time of the occurrence he was beastly drunk, saying that he was not moved by malice, that as soon as he recovered his senses and was informed of his ravings he sent a letter of apology, and that he acknowledges the respectability of the plaintiff and her family, which could not be and was not injured by his defamatory language. Subterfuges of that description cannot avail him.

The evidence establishes conclusively the facts charged, which may even be considered as admitted by the tergiversating answer.

Drunkenness is not a defense to an action of slander, though it may perhaps be a matter of mitigation. Towns. Lib. and Sland., § 249; Odgers Lib. and Sland. 169 n.; 5 Ill. (4 Scam.) 30; 25 Iowa, 87.

Apology implies a fault, whatever merits it may have; it surely does not release from liability, unless where accepted with that intent, otherwise it would place in the power of one to do injury and then discharge himself by an apology. Towns. Lib. and Sland., § 250; 27 Ann. 219.

In the present instance the *amende* proposed was a mere letter to plaintiff, which did not even offer to recant or make retraction before the persons in whose presence the offense was perpetrated.

The evidence shows that on the night of defendant's marriage a crowd went to his house and commenced a *charivari*, blowing horns and beating tin pans, and that the defendant, who had become drunk and furious, came out pistol in hand commencing firing or trying to. and calling the plaintiff, her daughters and sons, the villainous names already stated.

However lawless the crowd and great the provocation offered defendant may have been, surely the plaintiff, who was not present

Williams v. McManus.

and who is not shown to have had any thing to do with the disturbance, cannot be imputed with any fault, the less so, as her good character and social standing are well established.

The use of the opprobrious epithets employed implies malice, where these are slanderous *per se*. It suffices to maintain an action to recover damages without proving special injury. 12 U. S. Dig. 1st series, 488, No. 67; 14 L. 198; 12 Ann. 894; 23 Ann. 280; 36 Ann. 469.

Every person has a right to enjoy that degree of respect, good will and social or business distinction to which his own acts and his social or business habits entitle him, and any one who unlawfully interferes with this right by circulating slanderous reports renders himself liable for consequent damages. Folklund's Stark. Lib. and Sland., p. 99, n. § 2.

The plaintiff necessarily must have been and certainly was intensely mortified in her feelings, though she suffered no actual damages assessable in dollars and cents.

It is true that injuries to the feelings and to one's social standing are not susceptible of precise adjustment, but such injuries are recognized as a legitimate ground of action for reasonable indemnity. 17 Ann. 64; 19 Ann. 322; 23 Ann. 280. *Vox semel emissaa, non revertit.*

The acknowledgment which defendant makes of plaintiff's respectability, in his answer, is sheer justice, but it cannot be invoked successfully in complete vindication of plaintiff's reputation or in full atonement for the injury inflicted. Defendant must be held to further reparation.

Considering that the defamatory language used was uttered on one occasion only, on which it is easy to conceive that defendant could quickly inflate into a passion; that the occurrence took place in the night-time, before a crowd not large; that the actor was in great ebullition and not in the full control of himself; that he is a laborer of general good demeanor and of limited means,—we think that the jury did not make a proper and commensurate allowance and went beyond the limits to be observed in such cases.

It is therefore ordered and decreed that the judgment appealed from and the verdict whereon it rests, be amended by striking therefrom the words "two thousand," so that the verdict and judgment be for \$500 only, and that thus amended the same be affirmed, the plaintiff to pay the cost of appeal, the defendant those of the lower court.

Payne v. Morgan's Louisiana and Texas Railroad and Steamship Company.

PAYNE V. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

(36 La. Ann. 164.)

Railroad—obstruction of drains by embankment.

A railroad company obstructing the ditches and drains of a plantation and causing an overflow by its embankment, is liable for the consequent loss of crops.*

ACTION for damages by loss of crops. The opinion states the case. The plaintiff had judgment below.

Henry C. Miller and Branch K. Miller, for appellee.

H. J. & G. J. Leovy, J. P. Blair and E. B. Kruttschnitt, for appellant.

POCHÉ, J. Plaintiff's demand is for the sum of \$12,800 as damages for the loss of a crop of sugar cane and stubble, and for amount of labor used thereon, occasioned by the act of the defendant, while constructing its railroad bed across his plantation, in doing which the company stopped the ditches and other drains necessary to the proper cultivation of his aforesaid crop, which had been put in the ground in the fall of 1881, for harvest during the following season.

The defense is a general denial, and this appeal is taken by the company from a judgment of \$6,020 in favor of plaintiff.

A preliminary question grows out of a supplemental or amended petition filed by plaintiff with leave of court.

[Minor questions omitted.]

A proper investigation of the case presents two questions :

1st. Whether the defendant is legally responsible for the loss of plaintiff's crop.

2d. If so, what is the amount of the loss to be accounted for ?

1. The record is very voluminous and the testimony is conflicting, but after a careful analysis of the same, we find the following facts to be established by the record :

The Barbreck plantation involved herein is situated on both sides of Bayou Boeuf in the parish of St. Landry, and the crop in dis-

* Same effect, *Drake v. Ohio, etc., R. Co.* (68 Iowa, 302), 50 Am. Rep. 746.

Payne v. Morgan's Louisiana and Texas Railroad and Steamship Company.

cussion had been planted on that part of the plantation which lies on the east bank of the bayou. The fall of the land there is from the bayou toward the low lands or swamp in an eastern direction. Hence the drainage of that part of the plantation was operated by means of a large number of ditches of various sizes, some twenty-six in number, beginning near the bayou, and ending mostly in the low lands on the eastern limit of the plantation.

There was in addition a large canal, which began in the northern limit of that field, and crossing it diagonally, emptied into the Bayou Boeuf, at a bend formed by that stream in the southern extremity of that part of the place. The defendant's road bed crosses the plantation from south to north, almost parallel with the bayou, and intersects the twenty-six ditches referred to at right angles or nearly so. It crosses the main ditch known as the "Graveyard canal," in a diagonal line.

In throwing up the embankment, which is several feet above the level of the soil, the contractors of the defendant company closed up nineteen of the plantation ditches, and in leaving openings for the eight others, thus placed defective and insufficient culverts or boxes, in consequence of which the waters accumulating from frequent and heavy rains in the ensuing winter, being thus without draining facilities, stagnated on the planted lands between the bayou and the embankment, rotted and destroyed the cane therein planted.

It is shown to our entire satisfaction that the land had been carefully and skillfully prepared for planting purposes; that the seed cane used was good and sound, and that the planting had been skillfully done, neither too shallow nor too deep; that the soil was fertile and had heretofore always produced good crops, and that under ordinary circumstances plaintiff would have realized a handsome crop from that field.

The drainage of the plantation had been intelligently conceived and thoroughly executed, and presents as complete a system of drainage as could be found anywhere in the State. Previous to the construction of the defendant's embankment the crops cultivated in that field had never lingered or suffered from the action of rain water, which had always been regularly and safely carried off by means of the efficient drainage which we have described.

Throughout the summer and during the fall and winter of 1881, while the embankment was being constructed, and after its comple-

Payne v. Morgan's Louisiana and Texas Railroad and Steamship Company.

tion, plaintiff in person and through his agents made numerous protests against the invasion of his private rights by the wanton stoppage of his drains, but he could obtain no redress, and a suit in damages was his only alternative.

The crop planted in that field was an entire failure, only five or six acres of scattered cane grew up in the field, representing little or no value to the despoiled planter. And in the face of such a showing the defendant resorts to the very aggressive argument that plaintiff was not a careful or skillful planter; that his cane had been planted too deep, and that his drainage, which was hitherto deficient, had been substantially improved by the company's system. That system involves the proposition that more water will pass, and will run more rapidly through eight ditches or canals than through twenty-seven, and that an opening of five feet is sufficient to freely pass the water which fills a canal fifteen feet wide and seven feet deep.

The argument might be considered sarcastic if it had the slightest reason either in fact or in experience for its support. But it can make no impression on the judicial mind, which must trace proven effects to rational causes.

No argument can be invoked to show that a railroad company, in entering the lands of another for the purpose of building its road-bed, can legally alter the system of drainage adopted by the owner, or dictate to the latter the mode of cultivation which he must follow.

Under our jurisprudence, which has been in accord with the adjudications of the Supreme Courts of the leading States of the Union, the corresponding rights and duties of railroad companies, in making the works necessary for the construction of their roads on lands legally appropriated therefor, are clearly defined.

"The rule of law requires of a railroad company, in enforcing its right of way over the lands of others and in constructing its road, to leave the adjoining lands and fields which it crosses in the same condition, as regards the facilities of cultivation and as concerns the utility of those lands to their owners, as they were before the entry of the company." *Bourdier & Bellieinn v. Morgan's R. Co.*, 35 Ann. 947; *V. S. & Pacific R. Co. v. Dillard*, 35 Ann. 1045; *R. Co. v. Murrell*, 36 Ann. 346.

This plain rule which finds its sanction in common sense as well as in justice, and which imports the reasonable exercise of all rights

Holzab v. New Orleans and Carrollton Railroad Company.

of property, was not heeded by the defendant company, which left plaintiff's field practically stripped of its indispensable drainage, thus destroying its utility for cultivation to the owner.

We are not now concerned with the works and other improvements subsequently made by the railroad company on plaintiff's lands as regards his drainage. Defendant's responsibility must be tested under the condition, as shown by the evidence, in which it left plaintiff's lands in the summer of 1881, and in which the field remained throughout the ensuing winter, at least to the middle of January.

Our conclusion is that he lost his eighty acres of cane through the stoppage of his draining canals and ditches by the contractors and other agents of the defendant company, and that for such losses the corporation is plainly, justly and legally responsible.

Judgment affirmed.

HOLZAB V. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

(38 La. Ann. 185.)

Carrier — negligence — concurrent.

Where a railway passenger is injured by the concurrent negligence of his carrier and another, the negligence of his carrier is not imputable to him.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Henry P. Dart, for appellee.

Bayne & Denegre and *Farrar & Simonds*, for appellants.

MANNING, J. The action is for the recovery of \$5,000 as damages for injuries to the plaintiff's wife caused by a collision of railroad trains, and was instituted against the New Orleans and Carrollton Company alone, but by a supplemental petition the Illinois Central railroad was made a co-defendant. Mrs. Holzab was a passenger upon the Carrollton road, one of the numerous tramways of this city, and the collision occurred at the intersection of Baronne and St. Joseph streets, in the middle of which latter street the Illinois Central runs its steam trains.

* See 57 Am. Rep. 488.

Holzab v. New Orleans and Carrollton Railroad Company.

A train of freight cars of the Illinois Central was standing on the St. Joseph street track divided into two parts, the gap between them being at the intersection of Baronne of sufficient width to permit the passage of the horse-car of the Carrollton road. The driver of the horse-car, in which Mrs. Holzab was seated, entered the gap and while going through, the freight train was backed and collided with the horse-car. The plaintiff's wife was thrown to the floor and was bruised. She was pregnant. The shock caused an illness that does not seem to have been severe or dangerous, but she was in bed several weeks and confined to her bed-room longer, undergoing medical treatment with considerable suffering and some expense. Abortion did not ensue but her nervous system was deranged temporarily by the shock and her health suffered in consequence.

The two railroads severed in their defense and a trial was had first with the Carrollton company which resulted in a judgment for the company. The trial now under review is that had with the Illinois Central in which the judge below awarded the plaintiff \$300 as damages. The defendant appeals, and although the plaintiff says in his brief he has prayed an increase of the judgment, there is no answer to the appeal or prayer in any other form for increase of the damages.

[Minor matter omitted.]

The ordinances of this city impose the duty upon the defendant railroad to station a watchman with a red lantern or signal flag at the intersection of streets upon which cars run at least two minutes before the approach of the trains, and also to ring a bell at intervals while the trains are passing within the limits of the city. They further require that this railway shall use a smokeless dummy on St. Joseph street, and that it must be kept always in front of the train while in motion, and all railroad companies are prohibited from permitting their engines or trains to remain standing upon any street or crossing within the city so as to obstruct crossing in any manner whatsoever, except in so far as may be done by trains in motion.

There was a conspicuous violation of all these ordinances by the defendant. The train was backed by a reverse engine instead of being propelled by a dummy in front, and two freight trains were standing on the street. No bell was rung, and no flagman was stationed at the intersection of the streets. A horse car had passed

Holshab v. New Orleans and Carrollton Railroad Company.

through the gap two minutes before, so that the train must have started to back within two minutes of the collision. Negligence is thus fastened upon the defendant. Its defense is that if any damage was suffered by the plaintiff's wife, it resulted from the gross carelessness and contributory negligence of the Carrollton road, in whose car she was riding, and that she is identified with the negligent driver or owner of that car and cannot recover.

More elaborately stated, the doctrine is that a party who is a passenger in a public conveyance is in some way identified with those who own or have charge of it and that he can recover of the owner of another public conveyance that has collided with it and injured him, only when they who own or have charge of the conveyance in which he is riding can recover, the principle being that their contributory negligence is imputable to him so as to preclude his recovery for any injury when they cannot recover in consequence of this negligence.

The doctrine was first asserted in *Thoroughgood v. Bryan*, 8 C. B. 115, decided by the English court of Common Pleas, and while generally followed in that country since, its correctness has been questioned there by high authority. In this country it has been followed by some courts and rejected by others. It is so unjust to attribute to a passenger the negligence of the agents of the company in whose carriage he is riding, so untrue in point of fact that any identity exists between them, and so true that it can only be held to exist by a sort of legal fiction, that it is not surprising there has been a judicial revolt against the doctrine. The only way in which the identification of the passenger with the driver or train conductor can result is by holding the latter to be the servant of the former, but that cannot be, because the passenger has no control over the conductor, and the right to control the conduct of the servant is the foundation of the doctrine that the master is affected by such conduct and is responsible for it. We should reject the doctrine as illogical and unjust, even in the face of authority as high as the English courts, but the question is set at rest for us by a decision just rendered by the United States Supreme Court.

The case is *Little v. Hackett*.* The plaintiff hired a public hackney-coach for a drive to a park, and the vehicle was crossing the railroad track *en route* to the park when it was struck by the engine of a passing train and the plaintiff was injured. The hack-

* 116 U. S. 366.

ney-coach belonged to a livery stable keeper, and was hired at a stand for such coaches near a hotel and was driven by a person in the employ of the liveryman. The evidence showed that the accident was the result of the concurring negligence of the managers of the train and the driver of the carriage — of the managers in not giving the usual signals of the approach of the train by ringing a bell and blowing a whistle, and in not having a flagman on duty — of the driver in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence of the driver in driving upon the track under those circumstances, and that his negligence was imputable to the plaintiff under the doctrine of identification as already set out.

The court reviewed all the decisions on that question, beginning with *Thoroughgood v. Bryan*, the ruling in which the court said was indefensible, and after marshalling the American cases that followed that decision and those that rejected it, summed up by ruling that one who hires a public hack and directs the driver to convey him to a particular place, but exercises no other control over his conduct, is not responsible for his negligence and is not prevented from recovering from a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of the managers of the train and of the driver of the hack.

The case at bar is stronger for the plaintiff than that just narrated. In that case the plaintiff had given directions to the hack driver where to go, and the route to that destination led across the railroad track near the station. There might have been a pretext or a reason for holding that the plaintiff was identified with the driver in consequence of the driver being for the time under his control and compelled to drive whither he should order, and because he actually did order the driver to convey him to a place to reach which the carriage must cross the railroad track.

In the case at bar the plaintiff's wife was a passenger in a horse car that ran over a certain track as fixed and immovable as that of a steam train, and she had and could not have had any control over the driver as to her route, nor indeed in any other particular. If the principle of non-identification be correctly applied in *Little v. Hackett*, and we have not a doubt that it was correctly applied, *a fortiori* must it control the liability of the defendant in this case. There is no obstacle on that ground to the plaintiff's recovery.

State v. Molisse.

It is therefore ordered and decreed that the judgment of the lower court is amended by allowing interest from the date of the judgment, and as thus amended it is affirmed, the defendant paying the costs of this appeal.

Judgment affirmed.

STATE V. MOLISSE.

(35 La. Ann. 361.)

Criminal law — declarations — res gesta.

The statement of the deceased, ten minutes after he had been fatally shot, that "if he had not been so willing to fight he would not have been shot by the defendant," is admissible as part of the *res gesta*. (See note, p. 184.)

CONVICTION of manslaughter. The opinion states the case.

E. J. Cunningham, attorney-general, and *Lionel Adams*, district attorney, for State.

D. C. Moise, *A. A. Ker* and *J. Duvigneaud*, for appellant.

MANNING, J. The defendant appeals from a sentence to five years' imprisonment at hard labor upon a conviction of manslaughter, and presents but one question for our review.

He offered one McGruder as a witness to prove that the deceased, ten minutes after he had been fatally shot, said to the witness "if he had not shown himself so plucky and willing to fight he would never have been shot by the defendant." The judge excluded the testimony because "it was not under the circumstances part of the *res gesta*, and was not said by the deceased under the sense of impending dissolution."

"*Res gesta*," says Wharton, "are events speaking for themselves through the instinctive words and acts of participants, not the words and acts of the participants when narrating the events, but what is said or done by participants under the immediate spur of the transaction, because it is the transaction which then speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself. And as long as the transaction continues, so long do acts

and deeds emanating from it become a part of it, so that in describing it in a court of justice they can be detailed. The question is, is the evidence offered that of the event speaking through participants, or that of observers (or participants) speaking about the event. In the first case, what was said can be introduced without calling those who said it; in the second case, they must be called. Nor are there any limits of time within which the *res gestæ* can be arbitrarily confined. They vary in fact with each particular case. * * * As soon as we pass the line which distinguishes between the transaction talking of itself and talking as modifying the transaction, in other words, as soon as we pass the line between the time of the transaction and the time that follows it, we have no limits that can be imposed. If we are to receive declarations made ten minutes after a transaction, we must receive declarations made ten years afterward." Whart. Cr. Ev., § 262.

This would exclude the testimony offered, but in the next section the author proceeds:

"The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. They need not be coincident as to time if they are generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate. In other words, they must stand in immediately causal relations to the act and become part either of the action immediately producing it, or of action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. Under the rule before us, evidence in homicide trials has been received of the exclamations of the defendant at the time of the attack; of the cries of the deceased and of others assaulted at the same time; of statements of the deceased, at the time or so soon afterward as to preclude the hypothesis of concoction or premeditation, charging the defendant with the act." § 263.

And under that, the testimony is admissible.

The rule is that time does not determine absolutely whether a statement is part or not of the *res gestæ*, although it is a factor and an important factor in estimating whether it is, and therefore it is

State v. Mollase.

not correct to say that declarations made ten years after an event can as well be received as those made ten minutes after it. If the acts or declarations are unconsciously associated with and related to the homicidal deed, even though separated from it by a short time, they are evidence of the character of the deed and a part of the *res gestæ*. No inflexible rule as to the length of the interval between the act of killing and the act or declaration of the person killed can be formulated. In that matter the facts of each case stand alone and must speak for themselves. In each case the particular facts and incidents must be considered as an independent group, and the judge must determine whether they fall within or without the operation of the rule. And this is what Greenleaf means when he says the trial judge must determine the admissibility of the evidence, and a large discretion is allowed him. He even says the ruling of the trial judge thereon is conclusive. Crim. Ev., § 108.

That is not so, certainly not under our uniform practice. His ruling is reviewable by this court, or we should not now be considering it.

There are several cases in the books that justify the contention of the defendant in this appeal.

In Massachusetts, the deceased, wounded and bleeding ran from her room where the wound was inflicted to the room occupied by the witness in the same house but in the story above, and knocked at the door, crying murder. On being let in, the deceased asked the occupant of that room to go for a doctor and a priest, saying she was killed. This declaration was admitted, the court ruling that although there was such interval as to allow the deceased to go from her room up stairs to another, it was sufficiently soon after the occurrence to be a part of the *res gestæ*. Com. v. *McPike*, 3 Cush. 181.

The English courts have ruled in like manner under resembling circumstances. Thus a prisoner was charged with manslaughter in killing the deceased by driving a cabriolet over him. A person who saw the cabriolet drive by but did not see the collision, went up to the injured man immediately afterward, attracted by a groan when he made a statement to the witness of the manner in which he had been run over. It was held to be a part of the *res gestæ*. *Rex v. Foster*, 6 C. & P. 325. In the same line see *Thompson v. Trevanion*, Skin. 402.

A man was killed by a blow from a stick. A girl heard his cry and going to him asked what was the manner and he said he had

been robbed by the man who had walked with him. This man was the party indicted for the murder, and the girl's evidence was admitted. *Reg. v. Lung*, 6 Cox C. C. 477.

The witness in this case should have been permitted to testify. The statement of the deceased to him was soon enough after the homicidal act and sufficiently connected with it to be an immediate concomitant of it and not a statement proceeding from or suggested by a calculated policy, and was therefore a part of the *res gesta*.

But the State insists that even if it was admissible, it could not affect the verdict. The prosecution was for manslaughter and the conviction was of manslaughter. If the jury had heard the deceased's statement that he would not have been shot if he had not been so willing to fight, it could not have reduced the verdict of manslaughter to one for a less offense.

It may be that the jury would so have found, but it is not for us to find so for them. The evidence should have gone to them. They alone have the right to weigh it.

It is therefore ordered and decreed that the sentence upon the prisoner and the verdict of the jury are set aside, and the case is remanded to the lower court for a new trial.

TODD, J., dissents.

Case remanded.

NOTE BY THE REPORTER.—See note 88 Am. Rep. 641; *Galveston v. Barbour*, 62 Tex. 172; s. c., 50 Am. Rep. 519; *State v. Horan*, 83 Minn. 394; s. c., 50 Am. Rep. 588; *Kirby v. Com.*, 77 Va. 681; s. c., 46 Am. Rep. 747; *Greenfield v. People*, 85 N. Y. 75; s. c., 39 Am. Rep. 636; *Adams v. Hannibal & St. J. R. Co.*, 74 Mo. 553; s. c., 41 Am. Rep. 333.

In *Mayes v. State*, Sup. Ct. Miss., Feb. 7, 1887, it was held that the declarations of a person who had been fatally wounded, made at a place to which he had fled, to a witness by whom he was found, about five minutes after he was cut, as to how and by whom he was cut, were inadmissible, on a murder trial, as part of the *res gesta*. The court said: "An examination of the approved text-writers, and of the decisions to which they refer, discloses, especially in the decisions of American courts, a somewhat loose regard for well-recognized rules governing the admissibility of evidence. That hearsay testimony cannot be given is universally admitted by the courts which have from time to time been called upon to determine whether statements of this character are competent, and they have without exception declared that, when the statement assumes the character of a narrative of a past transaction, it is incompetent. But in many cases, what were manifestly completed and finished acts have been, by a sort of construction, treated as incomplete and unfinished, and the statement thus held to be a verbal act incorporated with and a part of the thing being done.

"In *Thompson v. Trevanion*, Skin. 403, Lord Chief Justice HOLT allowed that what the wife said immediately upon the hurt received, and before that

State v. Mollise.

she had time to devise or contrive any thing for her own advantage,' might be given in evidence. In *The King v. Foster*, 6 Car. & P. 323, the witness had seen a cab drive by at a very rapid rate, but did not see the accident, but 'immediately after heard the deceased groan, and went to where he was lying.' It was then proposed to show what the deceased then said as to the cause of his injury, and objection was made by the defendant, but the objection was overruled; the judge ruling that what he said at the instant, though after the injury, was competent. These two cases, as was pointed out by Mr. Justice CLIFFORD in his dissenting opinion in *Ins. Co. v. Mosley*, 8 Wall. 419, have been criticised by Mr. Roscoe as 'difficult to reconcile with established principles.' In *Ins. Co. v. Mosley*, *supra*, statements of the deceased made several minutes after an injury, which it was alleged had resulted in death, as to how he was injured, were admitted by a divided court. In *Com. v. McPike*, 3 Cush. 181, the statement of the injured party, made some time after the injury—exactly how long is not shown—was received. So also in *People v. Vernon*, 35 Cal. 49, and *Mitchum v. State*, 11 Ga. 616. On the other hand, in *Reddington's* case, 14 Cox Crim. Cas. 341, the injured party was seen coming out of a room with her throat cut, and speaking to the first person she met, said: 'See what Reddington has done.' It was proposed to give this statement in evidence against the defendant, but COCKBURN, C. J., rejected it, holding that it was not a part of any thing then being done, but was a mere statement of a past transaction. *Com. v. McPike*, 3 Cush. 181, has been practically overruled by the subsequent cases of *Lund v. Tyngsborough*, 9 Cush. 36; *Chapin v. Marlborough*, 9 Gray, 244 and *Com. v. Denmore*, 12 Allen, 535. So also *People v. Vernon*, 35 Cal. 49, has been overruled in the later case of *People v. Ah Lee*, 60 Cal. 85. The question of the admissibility of such statements was elaborately and ably discussed by FLETCHER, J., in the case of *Lund v. Tyngsborough*, and by CLIFFORD, J., in his dissenting opinion in *Ins. Co. v. Mosley*, 8 Wall. 419. We concur in the views there so clearly enunciated against the competency of such proof, which are in harmony with decisions in our own State. *Kendrick v. State*, 53 Miss. 436; *Kraner v. State*, 61 Miss. 158.

"It is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, nor that it was made under such circumstances as to compel the conviction of its truth. The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history of a completed past affair. In the one case it is competent, in the other it is not. We are not to be understood as attempting to lay down any rule for the decision of what, under all circumstances, is the limit of the existence of the principal fact which may be explained by contemporaneous declarations. In some cases the *res gesta* may extend over weeks or months; in others they are limited to hours or to minutes or to seconds of time. Each case must be determined by its own particular circumstances. Mr. Wharton very well expresses the law on this subject by contrasting a sudden affray between strangers with the social feud which gave rise to the Gordon riots in

England. He says: 'Nor are there any limits of time within which the *res gesta* can be arbitrarily confined. They vary in fact with each particular case. If in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gesta* of the collision are confined to within the few moments that it occurs. But when there is a social feud, in which two religious factions, as in the case of the Lord George (Gordon disturbances or of the Philadelphia riots of 1845, are arrayed against each other for weeks, and are so absorbed in the collision as to be conscious of little else, then all that such parties do or say is as much part of the *res gesta* as the blows given in the homicides for which particular prosecutions may be brought.' Whart. Crim. Ev., § 262.

"We think the statements of the injured party were not of the *res gesta*; that they found no support or credence by reason of any thing then being done, but owe their whole force to the credit of the declarant, and therefore should have been excluded by the court."

See *State v. Clark*, 69 Iowa, 294, to same effect as the principal case.

In an action to recover damages for death caused by negligence, declarations of the deceased as to the cause of the injury sustained, made after he had returned home, and more than thirty minutes after the accident, are not admissible as part of the *res gesta*. It is difficult, if not impossible, to say definitely what constitutes a part of the *res gesta*. No absolute rule is or can be established in relation thereto. A discretion is and must be reposed in the court, and therefore each case must largely depend upon the circumstances surrounding the transaction or *res gesta*. If the proposed evidence is merely a narration of a past occurrence, then it cannot be received as proof of the existence of such occurrence. 1 Greenl. Ev., §§ 108-110. The *res gesta* or transaction was the accident, and how it occurred. It is not essential that the declaration sought to be introduced in evidence was uttered at the identical time the accident occurred, but if made soon afterward, and explanatory thereof, it is admissible. *State v. Jones*, 64 Iowa, 849; *Insurance Co. v. Mosley*, 8 Wall. 397. In the former the declaration preceded the occurrence, but was made in anticipation of it, and explanatory of a purpose. In the last case the deceased, for a proper purpose, left his house in the night-time, and immediately upon his returning he stated that he had fallen down stairs and hurt his head. This evidence was held admissible, by a divided court; and in *People v. Davis*, 56 N. Y. 102, it is said in relation thereto, that "what may be regarded as a part of the *res gesta* was certainly carried to its utmost limit by a majority of the court." We are however, we think, asked to go a step further than that case. In the cited case the deceased left his bed, and passed out of his house for a certain purpose; and when he came back, said that in accomplishing such purpose he had fallen down stairs, etc. It seems to us that the declaration may be said to be explanatory of what occurred during his necessary absence; and while it may be difficult to draw a sharp distinction between that case and the one at bar, still we think there is a marked difference. In this case it does not appear when the deceased left home, or that he left there for the accomplishment of an avowed purpose. He did not voluntarily, and of his own accord, return home after the accident, but he was taken home by others;

State v. Molisee.

and the declaration sought to be introduced was not made on his own motion, as explanatory of either his absence or the condition he was in. We feel constrained to hold that the evidence sought to be introduced does not constitute a part of the *res gesta*, and is therefore not admissible. *People v. Davis, supra; Armil v. Chicago, B. & Q. R. Co.*, Iowa Sup. Ct., Oct. 29, 1886.

In *Thomas v. State*, 67 Ga. 460, on a trial for murder, it appeared that the defendant and deceased were living together as husband and wife; that the deceased was jealous of his attentions to another woman, and had quarreled with him about the latter; that on the night of the homicide she left her house, saying as she went: "There are two person down the alley; I think it is Harp (defendant) and his sweetheart; I will go and see; that she went, but never returned; and that the next day she was found murdered near where she expected to find defendant. *Held*, that such statements by her were admissible as part of the *res gesta*. The court said:

"The Code of this State declares that 'declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicions of device or after-thought, are admissible in evidence as part of the *res gesta*.' This woman was dead; there can be no after-thought; what suspicion of device can arise in reference to this saying of hers in this case? The remark accompanied her act in leaving and her purpose to see the defendant on an errand of jealous anger; it was so near the fatal *rencontre* as to preclude the thought of plan or device to utter a falsehood. It was admissible on both branches of the rule expressed so clearly in the statute "

In *Mitchell v. State*, 71 Ga. 128, where a witness reached the scene of a conflict in a very few minutes after the deceased fell, and assisted in bearing him away, and when they had gone about thirty or forty steps the wounded man asked the witness "what did you shoot me for?" — the whole transaction not occupying more than five minutes — such facts were held a part of the *res gesta*.

In *Flynn v. State*, 43 Ark. 289, "to sustain the issue that the shots were fired at Pruitt, for that was the charge in the indictment, the State introduced John Boicourt, who testified as follows:

"I was at Little Rock the Sunday morning of the shooting; I was in the lobby of the Capital hotel. I was standing facing the door leading from the lobby of the hotel into the billiard-room, talking with some gentlemen and we were just finishing the conversation when this crack came; I thought at first that some one had slammed the door very hard and broke the glass; before I got to see the door something else sounded, and I distinguished the sound of a pistol, and ran back through the billiard-room to a little alley-way, to keep out of the line of the shots, and several other gentlemen ran back with me; it was so thick I could not get through; a little small man came running up on my side and said, 'He is shooting at me; Wm. Flynn is shooting at me;' he look scared, and I said 'Gaddy you, I am going to get out of your way.' Witness further stated that the little small man referred to was Robert Pruitt." The court said

"It often becomes difficult to determine when declarations shall be received as part of the *res gesta*. In cases like this words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of

concoction or premeditation, whether by the active or passive party, became a part of the transaction itself, and if they are relevant, may be proved as any other fact without calling the party who uttered them. And if the assaulted party should flee, as it is argued that Pruitt did here, what he says in his flight under the apprehension of immediate danger is admissible for the same reason. All declarations however must come from a participant in the transaction which the declarations are intended to explain or enlarge, to come within the rule."

In *State v. Walker*, 78 Mo. 390, the moment after a shot was fired resulting in death defendant's right hand fell to his side and he struck out with his left at the deceased, when a bystander exclaimed "Don't strike him, for you have shot him now." *Held*, that such exclamation was admissible in evidence as part of the *res gesta*; that it was called out by, and was illustrative of the affray while still in progress. The court said:

"There is great conflict of authority on the subject of what constitutes the *res gesta*. We feel satisfied that the remark or exclamation of Cole to Walker the moment after the shot was fired, and while the difficulty was still in progress, was thus admissible as illustrative of the act which generated or gave rise to the exclamatory remark of Cole.

"Mr. Wharton, discussing this point, says: 'The *res gesta* may therefore be defined as those circumstances which are the undesigned incident of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible, though hearsay, because in such cases, from the nature of things, it is the act that creates the hearsay, not the hearsay the act.' 1 Whart. Ev., § 259, and cases cited.

"It will be seen from the above quotation that in the view of some of the authorities at least, the exclamations made at the time of the occurrence, or immediately thereafter, and immediately and naturally connected therewith, form part of the *res gesta*, whether such exclamation proceed from one of the parties to the transaction, or from a bystander.

"Thus it has been held that where the issue was whether the deceased had 'died by his own hand,' his death having been caused by a pistol shot, the declaration of the occupant of an adjoining room to that of the deceased, made immediately after the report of the pistol was heard, to the landlord of the hotel, that the deceased had shot himself, was held part of the *res gesta*.

State v. Moliase.

Newton v. Ins. Co., 2 Dill. 154. This case follows, as stated therein, as being within its reasons and principles, that of *Ins. Co. v. Mosley*, 8 Wall. 397, where the declarations were made by the husband within a few moments after the fall which resulted in his death; thus showing that in the opinion of the court, in the former case, no distinction is to be taken between the involuntary exclamation of a bystander, and those of a party directly interested or injured.

"In a case in Massachusetts, where a suit was brought against a steamboat for injuries to a passenger by the fall of a gangway leading from a wharf to the defendant's boat, evidence was admitted that men working at the gangway were warned, immediately before the accident, that the plank was unsafe. *Parker v. Steamboat Co.*, 109 Mass. 449. So also in Alabama, in a suit against a railroad company for injury to a passenger, where the plaintiff received injury in leaping from a car, while others who remained were unhurt, the declarations of such other persons, giving their reasons for thus remaining, were held part of the *res gesta*. *Mobile R. Co. v. Ashcraft*, 48 Ala. 15. A similar rule in similar circumstances has been made in Illinois in respect to exclamations of passengers. *Galena R. Co. v. Fuy*, 16 Ill. 558. For these reasons we must hold the declarations of Cole admissible."

In *State v. Middleham*, 62 Iowa, 150, it was held that the exclamations of a wife upon the killing of her son by her husband, made in the presence and hearing of the husband, are admissible as against him. The wife had exclaimed, "My God! my God! he has killed my boy! He struck him right over my shoulder. See the blood of my boy on my sleeve. Take him away; I never want to see him."

In *Lander v. People*, 104 Ill. 248, on a trial of a charge of rape, two witnesses were called who were near by and witnessed the perpetration of the offense, and who testified they saw and readily recognized the accused near the scene of the transaction on the next day thereafter, and that one called the attention of the other to the accused, exclaiming, "there goes the man!" and that the other replied, "yes, there he goes." The defendant objected to the witnesses repeating their exclamations made at the time, but the court permitted the same. *Held*, no error. The court said: "It is a well settled principle in the law of evidence, that whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper to also show any accompanying act, declaration or exclamation which relates to, or is explanatory of such fact or event. Such acts, declarations or exclamations are known to the law as *res gesta*. It is not questioned that it was perfectly competent to show that the witnesses saw and readily recognized the accused, near the scene of the transaction, on the following day, as testified to by them, and it must be admitted the spontaneous exclamation, 'there goes the man,' with the response, 'yes, there he goes,' is highly characteristic of the fact of their recognition. The true test, in all cases, by which the admissibility of such testimony is determined, is, the act, declaration or exclamation must be so intimately interwoven or connected with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose

to manufacture testimony, and we are of opinion the circumstances of this case clearly bring it within the rule."

In *People Simpson*, 48 Mich. 474, two women were walking together and one was fatally shot. In a prosecution for the murder the other testified that immediately after the shot was fired her companion exclaimed, "My God, Simpson, you have shot me," and then turned slowly and clasped the next to the top board in the fence close by. Another witness testified that he lived a block distant on the opposite side of the street, and was in the house when he heard the shot; that he ran to the place and found a woman leaning against the fence; that he went over as quick as he could and said to her "Who shot you, madam?" and that she said it was John Simpson. *Held*, that these declarations of the injured person were admissible. The court said.

"Were these declarations contemporaneous with the shooting, and so connected with injury as to illustrate its character? The declaration of a person wounded and bleeding, that the defendant had stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go up stairs from her room to another room, was held admissible after her death as part of the *res gesta*. *Com. v. McPike*, 3 Cush. 181. The present case resembles very closely *Lambert v. People*, 29 Mich. 71, where parties came up within three minutes after a robbery, and the complaint then made was held admissible as a part of the *res gesta*"

In *People v. Ah Lee*, 60 Cal. 85, the court said: "What the deceased said at any time when the defendants were not present was not admissible in evidence against them, unless shown to be a part of the *res gesta*, or dying declarations of the deceased. It is not claimed that any statements made by the deceased were admissible as his dying declarations, but it is claimed that those made immediately after the stabbing were admissible as part of the *res gesta*."

"There are cases which hold that declarations made by the party injured, as to the cause and manner of the injury which terminated in his death, are admissible in evidence against the person charged with the homicide, although made after all action on the part of the wrong doer, actual or constructive, had ceased. *Commonwealth v. McPike*, 3 Cush. 181; *People v. Vernon*, 85 Cal. 49.

"In the former case it was held that the declarations of a person, who was wounded and bleeding, that the defendant had stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, was admissible in evidence, after her death, as a part of the *res gesta*. In the latter case the evidence of the declarations was held to be admissible on the ground that they were made within three-fourths of a minute after the first shot was fired, which was immediately succeeded by three other shots. In both of these cases the admissibility of the evidence of such declarations is made to depend upon the length of time which elapsed between the inflicting of the fatal wound and the making of the statement. If that be the criterion, it is quite evident that the requisite length of intervening time will vary as it did in the cases above cited; and in the admission of testimony of this character much would have to be left to the exercise of the sound discretion of the judge at the trial.

State v. Mollise.

"There are two English cases (*Thompson v. Trevanion*, Skin. 403, and *Rex v. Foster*, 6 Car. & P. 835), which sustain the doctrine of *Commonwealth v. McKits* and *People v. Vernon*, *supra*. Of the two English cases Mr. Roscoe says: 'These two cases are difficult to reconcile with established principles. It is to be observed that both extend to the particulars of what was said, and though they were both made in close proximity to the event to which they profess to relate, it seems very questionable indeed whether that ground alone, as is presumed by Lord HOLT, is sufficient to render them admissible. In *Rex v. Foster*, there was the additional circumstance that the person who made the statement was dead; but it seems to require much consideration whether as a general rule the statements of a deceased person as to the circumstances of the injury which caused his death, made immediately after the injury, but not under circumstances which entitle them to be considered as dying declarations, are receivable in evidence.' Roscoe Cr. Ev. 261. In *Reg. v. Bedingfield*, tried in 1879, the prosecution offered to prove that the deceased, some ten or fifteen minutes before her death, coming from her house, at a distance of fifteen or twenty yards from her door, holding her apron to her throat, exclaimed: 'Oh, dear aunt, see what Bedingfield has done,' Bedingfield not being present at the time. COCKBURN, C. J., with the concurrence of FIELD and MANISTY, JJ., held that the evidence was inadmissible.

"To a criticism on this ruling, the chief justice replied in a pamphlet, in which, among other things, he said:

"What, then, are these limits, and where, looking to the law as it exists, are we to draw the line? In other words, what is the meaning of the term *res gesta* as applied to a criminal case? To this I should propose to answer thus:

"Whatever act or series of acts constitute, or in point of time immediately accompany and terminate in the principal act charged as an offense against the accused, from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrong doer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused during the continuance of the action of the latter, actual or constructive, *e. g.*, in the case of flight or applications for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gesta* or particulars of it; while on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention, or its abandonment by the wrong-doer, such as, *e. g.*, statements made with a view to the apprehension of the offender, do not form part of the *res gesta*, and should be excluded.

"Whatever, whether acts or words, forms part and parcel of the fact which is the subject of the judicial inquiry, presents no difficulty. Words uttered during the continuance of the main action, whether by the active or the passive party, though they cannot amount to acts for which the accused can be

held responsible, yet may so qualify or explain the act or acts they accompany, that they become essential to the due appreciation of them. There is every reason, therefore, for considering words so spoken during the doing of an act charged as the offense, as part and parcel of the act itself. Moreover, words so spoken are generally admissible on another ground, clearly not open to exception, namely, that they are uttered in the presence and hearing of the accused. But even where the accused is no longer present, if the words are the immediate and natural effect and consequence of continuing action on his part, though uttered out of his hearing, they may well be considered as part of the transaction. Thus, to illustrate what I mean by a case not unlikely to occur. If a party assailed should succeed in escaping from the immediate attack and presence of his assailant, and should, while apprehending immediate danger, make a declaration in his flight with a view to obtaining assistance, such a declaration would be admissible, but not so if the declaration were made after all pursuit or danger had ceased. Or, to take another not unlikely case. A man is awaked in the night by hearing sounds as of some one breaking in at the back of his premises. He hastens to a back window and sees a man whom he knows, endeavoring to break in. He rushes to a front window opening to the street, and calls to a passer-by or to a neighbor for assistance, stating who it is that is breaking in. Or a man finds himself waylaid by another who makes a murderous assault on him; whereupon, succeeding in making his escape, he flies, and, outrunning his assailant, applies to the first person he meets for protection, stating what has happened, and who it is that has assailed him, and from whom he apprehends danger. In either of such cases, I should have no hesitation in holding the statement to be properly part of the *res gesta*. The statement is the immediate effect of the continuing, at all events constructively continuing act of the wrong-doer. But if in either of these cases, on the alarm being given, the wrong-doer were to desist and take to flight, statements subsequently made by the injured party to third persons would, I think, stand on an entirely different footing.' Whart. (Crim. Ev. § 263, note. He reviewed *Rez v. Foster* and *Commonwealth v. McPike*, *supra*, and dissented from the views therein expressed, upon this point.

"It is perfectly obvious that there is a limit to the time within which such statements must be made in order to be admissible in evidence as a part of the *res gesta*. But if made after the termination of the act to which they refer, they are merely narrative of a past transaction, whether made within a minute or an hour afterward. And 'where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence.' 1 Greenl. Ev. 110. 'An act cannot be varied, qualified, or explained either by a declaration which amounts to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period.' 1 Tayl. Ev. 53.

"In the case now before us, it does not appear that any thing occurred between the defendants and the deceased after the stabbing, and yet the prosecution was permitted to ask the witness what he heard 'either of the parties say at the time of the stabbing or immediately after.' In response to it the witness might have stated what was said by the injured party after the assail-

State v. Molisse

ants had fled, and he himself had reached a place of safety. And such appears to have been the construction which the witness, court and counsel placed upon the question. The statement to which the witness testified related to an act which had been completed, and the statement was clearly 'made with a view to the apprehension of the offenders.'

"If evidence of such statements is admissible, the rule which requires that declarations made by an injured party at any time after the infliction of the injury, must be made under a belief of impending death, in order to be admissible in evidence, should be abrogated. The distinction between statements which constitute a part of the *res gesta* and those which constitute 'dying declarations' should be clearly defined or obliterated. But we think that the line which separates statements which are admissible in evidence as a part of the *res gesta* from those which are admissible only as dying declarations, is well defined by Mr. Chief Justice COCKBURN."

In *State v. Pomeroy*, 25 Kans. 849, W. alleged that P. assaulted him while alone in his own house, with a musket, with intent to kill and rob him. P. was duly informed against, and on the trial of the criminal action the court admitted, over the objections of P., the declarations of W. made in the absence of P., three to five minutes after the transaction, to witnesses who ran to his assistance on hearing his cries of murder, that P. made an assault with a musket at the window, demanded his money, together with the words and acts of each other. *Held*, that the declarations of W. are merely hearsay, and therefore inadmissible.

In *Johnson v. State*, 65 Ga. 94, it was held that what the person assaulted said, though half unconsciously, so soon as she was found on the day of the assault, at the moment of the restoration of sensibility, is part of the *res gesta*, and admissible.

In *State v. Daugherty*, 17 Nev. 876, defendant was tried for an assault with intent to kill one J. B. Davis. Davis was not present at the trial. The prosecution was allowed to prove the declarations made by Davis, a few minutes after the difficulty, to persons who were present, to the effect that defendant made the assault. *Held*, error; that the declarations were not admissible in evidence as part of the *res gesta*. The court said:

"In *Rawson v. Haigh*, 2 Bing. 108, the question was whether an act of bankruptcy had been committed by the departure of the debtor from the realm with intent to delay or defraud his creditors. The testimony by which the act was to be proven were letters by him while abroad. BEST, C. J., said: 'The declaration, in order to be admissible, must be made or the letters written at the time of the act in question, but it is sufficient if they are written at any time during the continuance of the act; the departing the realm is a continuing act, and these letters were written during its continuance.' In the same case Baron PARK said: 'It is impossible to tie down to time the rule as to the declarations; we must judge from all the circumstances of the case; we need not go to the length of saying that a declaration made a month after the fact would of itself be admissible, but if as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole *res gesta*.'

Martin v. City of New Orleans.

"The general rule is that declarations, to become part of the *res gesta*, must accompany the acts which they are supposed to characterize, and so harmonize with them as to constitute one transaction. *Enos v. Tuttle*, 8 Conn. 350.

"They are admissible as incident to the principal act, and because they are part of it, and are necessary to explain its true character. *Ins. Co. v. Mosely*, 8 Wall. 412. The principal fact in this case was the assault. The declarations of Davis were no part of that. They were simply a statement of what was done at the time of the commission of the offense, and were therefore no part of the *res gesta*. The evidence was the narration of a past occurrence, and was incompetent."

MARTIN V. CITY OF NEW ORLEANS.

(36 La. Ann. 397.)

Taxation — exemption — "property employed in the manufacture of wood."

Vessels used to convey timber to saw-mills are not exempt from taxation as
"property employed in the manufacture of articles of wood."

SUIT to annul an assessment. The opinion states the case.

Chas. S. Rice, for appellee.

W. H. Rogers, city attorney, and *Blanc & Butler*, for appellants.

BERMUDEZ, C. J. The object of this proceeding is to annul the assessment made of property owned by the plaintiff, and which he alleges is employed in the manufacture of articles of wood. The defense is a denial of the exemption claimed. From a judgment reducing the assessment from \$42,675 to \$17,170, *i. e.*, by forty per cent, the defendant appeals. The facts do not appear to be disputed. One witness only was sworn, the plaintiff, and it is admitted that if another witness was heard, he would testify to the same purpose.

It is established by this testimony, that during the year 1884 plaintiff was engaged in the saw mill business, in which he had invested a capital represented by real estate, machinery, horses, vessels and active money.

It also shows that the vessels were employed in towing timber through rivers, lakes and bayous to this city, where it was sawed into planks and other raw lumber; part to be sold on the market and part to be converted by plaintiff into articles of wood, such as doors, sash and blinds, boxes, laths, necessary for the construction

of buildings and put in shape and style ready for immediate use. Some fifteen hands were employed in this last business.

The relative value of the property employed in the saw-mill business proper is sixty per cent, while that used in the manufacture of articles of wood is forty per cent.

Article 207 of the Constitution, on which the plaintiff relies, expressly exempts from taxation, during ten years from the adoption of the Constitution, "the capital, machinery, and other property employed in the manufacture of * * * furniture and other articles of wood * * * provided, that not less than five hands are employed in any one factory."

In the case of *Jones v. Raines*, 35 Ann. 998, we had occasion to consider the meaning and purview of this article, an attempt being made to extend the immunity which it accords, so as to apply to saw mills. We there held, that while it proposes to exempt some, it did not all manufacturers; and that were to be considered as protected by its provision, only such as are specially enumerated in it. We accordingly decided, that as saw mills did not enter into the contemplation of the framers of the organic law and had not been enumerated in the article, they could not be placed beyond the reach of the tax gatherer.

In the cases of *City v. Le Blanc*, and *City v. Beck*, 34 Ann. 596, we took pains to define who the manufacturers are, whom the previous article (206) exempts from license.

Applying the rulings in those cases to the present controversy, it is manifest that the property, of whatever nature, which is used in the saw mill business proper, that is, in the manufacture of raw materials, namely, of lumber, not ready for use, as are "furniture and other articles of wood," is not exempt from taxation.

The case is different however as to the property which is used for the manufacture of articles of wood, ready for use by the consumer.

The argument that the character of plaintiff's business must be determined by its principal and not by its incidental features, though apparently plausible (surely ingenious), is not entitled as a test to much weight, either to ascertain the nature of plaintiff's calling, avocation or pursuit; or to declare that of the property employed by him in his transactions.

It is clear that it was optional with the plaintiff to have used all the property in question exclusively, either in the manufacture of raw materials, or in that of articles of wood ready for use.

In the former case, the property representing a saw mill, preparing lumber to be dressed, would have been taxable in its entirety. In the latter, it would have been exempt from all taxation whatever.

It is however difficult to perceive, how and why, in the absence of any prohibitory clause in the Constitution, the plaintiff should not be recognized the right to employ that property to both uses.

Denying the plaintiff this important privilege would be to do violence to the Constitution by interpolating in it a restriction which, it does not appear, the framers of it intended to interpose.

The same article, in its first part, exempts from taxation "all places of religious worship or burial, all charitable institutions, all buildings and property used exclusively for colleges," etc.

The word exclusively is employed *ex industria*, to limit the exemption to property exclusively used for church, charitable and school purposes.

It was not inserted in the further part of the article, attending to property employed in the manufacture of certain articles. Had the intention of the framers of the Constitution been to exempt only such property as would be exclusively employed in such manufacturing, they would have unequivocally expressed it; but they have remained perfectly reticent on that qualification. It does not therefore appertain to this court to incorporate it in that provision; the less so, as in the case of *Jones v. Rains*, it was formally announced that the object of the exemptions created by it was to encourage and foster the establishment of manufactures of the various articles daily needed by the people.

It does not however follow, that all the property assessed is entitled to the exemption recognized by the District Court.

It is impossible to conceive how the vessels employed to procure the timber, can be justly entitled to the immunity. They are used to bring the timber necessary for the saw mill which manufactures primarily the raw materials to be dressed.

They are not used directly for the purposes of the manufacture of articles of wood, ready for immediate use by the consumer.

As well might the plaintiff claim, were he the owner of the lands from which the timber is felled, that such lands are likewise exempt, as they represent capital employed in the manufacture of articles of wood.

Maury v. Ranger.

It is therefore ordered and decreed, that the judgment appealed from be amended by striking therefrom the words "upon vessels to the extent of \$2,200," and that thus amended the same be affirmed, plaintiff and appellee to pay costs of appeal.

MAURY V. RANGER.

(36 La. Ann. 485.)

Agency — foreign agent — personal liability.

On a contract of affreightment, executed by a foreign agent, but disclosing the fact of the agency and the name of the principal, the agent is not personally liable.

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

Farrar & Kruttschnitt, for appellee.

D. C. & L. L. Labatt, for appellant.

POCHÉ, J. Plaintiffs seek to hold the defendants personally liable under a contract of affreightment which the latter had executed as agents.

The principal defense is that the defendants acted throughout the transactions which form the basis of this suit merely as agents of the owners of the vessel in whose name they had signed the bills of lading, and that they are not personally liable to plaintiffs under the contract declared upon. They prosecute this appeal from a judgment in favor of plaintiffs for the full amount of their claim.

The pertinent facts in the record are as follows:

In July, 1883, the defendants executed bills of lading to plaintiffs for 2,709 bales of cotton, to be received on board of the steamer *Gracia*, then on her way to this city, and consigned to Liverpool, England, at the rate of 19-64 of a penny sterling per pound. That under the effect of the quarantine then established by the State authorities at the mouth of the Mississippi river, the vessel *Gracia* was not allowed to reach the port of New Orleans, whereupon defendants, with the knowledge and consent of plain-

tiffs, shipped the cotton to Liverpool by the steamer *Chancellor*, owned by a different line of steamers.

The bill of lading issued by the latter steamer was to the steamer *Gracia*, but it called for freight at the rate of three-eighths of a penny, which was exacted from the consignees at Liverpool before delivery of the cotton by the *Chancellor*. It also appears that on delivery some of the cotton was found damaged, for which the shippers were charged the sum of £118 sterling.

The demand of plaintiffs is for the difference or freight charges on the cotton at the rate of 19-64 of a penny per pound and the charges exacted at the increased rate of three-eighths of a penny, and for the amount paid by them on account of the damaged cotton, the whole amounting in our currency to \$2,977.10.

Plaintiffs' theory, which was adopted by our learned brother of the District Court, under which they propose to make the defendants personally liable, presents two propositions of law:

1st. The agents of merchants residing in a foreign country, or in another State, are personally liable, whether they describe themselves as agents or not in the contract. In such cases it is presumed that the credit is given exclusively to them to the exoneration of their employers; but the presumption may be rebutted by proof that the credit was given to both, or to the principal only.

2d. Where an agent fails to disclose the name of his principal, he is bound personally.

While our appreciation of the facts in this case would justify the conclusion that the defendants would be exonerated even under the stringent and narrow rule contained in plaintiffs' first proposition, we prefer to rest our conclusions on other grounds, and to withhold our sanction of a principle which once prevailed in some English courts, but which has long since been repudiated by more progressive and enlightened jurisprudence, not excluding English tribunals.

The rule was formulated by Judge Story in his work on agency, predicated on some adjudications in the jurisprudence of England, but he lived long enough to appreciate its harshness and its damaging effect on international commercial intercourse, which was subsequently encompassed in more liberal ties, and became in time immeasurably increased and facilitated by the application of steam to navigation on the seas, the invention of the electric telegraph, and the multiplicity of railroad communications. Hence we find

Maury v. Ranger.

him in the revision of his work yielding a cheerful compliance with modern adjudications on the subject-matter, by the following material modification of his views as originally enunciated: "And probably the better rule is that the agent of a foreign principal is not, as a question of law, personally liable on every contract made for his principal. It is rather a question of fact in each case, a question of intention, to be ascertained by the terms of the particular contract and the surrounding circumstances." Story on Agency (6th ed.), § 268.

In the next section, 268 a, the learned author adds another very wise and very significant qualification to the rule in the following words: "this presumption of credit being given alone to the agent, and not to the foreign principal, applies with the most force to purchases made by an agent for a foreign principal; but when a written contract is made, and expressed to be with a foreign principal and not with the agent, the latter is not liable, although the contract be signed by him, for and on account of the foreign principal."

These principles are unqualifiedly sanctioned by respectable authority of other States of the Union; and in connection with the second proposition advanced by plaintiffs, they have been followed in several cases by our own Court. *Oelricks v. Ford*, 33 How. 49; *Lyon v. Williams*, 5 Gray, 457; *Bray v. Ketell*, 1 Allen, 80; *New Castle v. Red River R. Co.*, 1 R. 147; *Zacharie v. Nash*, 13 La. 20, *Nott v. Papet*, 15 La. 306; *Thorne v. Tait*, 8 Ann. 8; 14 Ann. 448, *Parlange v. Faures*; *Spotts v. Cowan*, 9 Ann. 520.

In our examination of this case we have been guided by the jurisprudence thus established, and we conclude that the case is clearly with the defendants.

In a contract of affreightment, such as the one disclosed in this record, we find an apt illustration of the wisdom of the rule that in determining the question of the presumption as to which of the parties credit is given, which is the vital issue in all such cases, courts must deal with the question of fact in each case, with the question of intention to be ascertained by the terms of the particular contract and the surrounding circumstances.

Now in this case the record shows that defendants were (like plaintiffs) commission merchants and factors and dealers in cotton; and that as an appendage to their main business they undertook the agency of a line of steamers known and designated as the "Serra Line of Steamers," plying between Liverpool and this port.

The nature of their connection with the steamer *Gracia*, for whose account they entered into the contract under discussion, was made known to plaintiffs by the very freight brokers, Dobell & Bell, who negotiated the contract between them and the defendants, and was made manifest to them on the very face and in every line of the bills of lading which were executed by the defendants, formally accepted, and at once transferred by indorsement by the plaintiffs as a commercial security.

The heading of the bill contains the words: "Serra Line of Steamers," "Louis Ranger & Co., Agents, New Orleans;" every stipulation in the bill is made in the name and for the account of the steamer, her commander and owners, and the contract is signed by the defendants as agents.

When later circumstances prevented the literal execution of the contract through the steamer contemplated by the parties, plaintiffs were at once notified of the circumstance, and of the intention of the defendants to make the shipment by another steamer, the *Chancellor*, of the Harrison Line, and were requested to change their insurance accordingly; all of which was accepted without murmur or objection by plaintiffs. And the record further shows that through a "cable" to the managers of the line at Liverpool, the defendants also notified them of the unforeseen disability of the vessel to carry out their contract with plaintiffs, and that the consent of said managers was obtained to operate the change of shipment to the *Chancellor*.

When sued in this case, the defendants again reiterated in their answer a statement of their true character in the premises and of their real and legal connection with the contract, and they amplified their previous disclosure of their agency as well as the names of the managing owners of the line of steamers. They therein declared that they were the agents of the "Serra Line, J. T. Nickols & Co., of Liverpool, managing owners," and defendants' principals.

We must hold these acts as a substantial and sufficient compliance with the very rule invoked by plaintiffs themselves, and as affording ample legal and equitable grounds to exonerate the defendants from all personal liability in the premises.

We premit any expression as to the right of plaintiffs to enforce their claim against any other party to the contract, and under the views as herein expressed we eliminate all discussion of the merits of their claims against the steamer *Gracia*, or her owners.

State v. Robertson.

The discussion would involve questions of great interest and of attractive study, but it would answer no useful purpose in face of the conclusion which we have reached.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed ; and it is now ordered and decreed that plaintiffs' demand against defendants be rejected, and that their action be dismissed at their costs in both courts.

Judgment reversed.

STATE v. ROBERTSON.

(38 La. Am. 618.)

Criminal law — rape — declarations — details.

In case of rape, the victim's complaints of the commission of the offense may be proved, but not the details nor the name of the ravisher.*

CONVICTION of rape. The opinion states the case.

M. J. Cunningham, attorney-general, for State.

J. J. Foley, for appellant.

TODD, J. The defendant appeals from a sentence of imprisonment at hard labor for life on conviction for rape.

The grounds of his appeal appear in two bills of exception found in the record.

One is to the following effect: The only direct testimony against the accused touching the commission of the offense charged was that of the alleged victim of the outrage.

Another witness was called by the State, who stated that the prosecutrix made complaint to her of the commission of the offense soon after its alleged occurrence, and was proceeding to repeat the details of the affair and to give the name of the offender as told her by the prosecutrix, when objection was made to such disclosures by the witness, on the ground that the matters about which the witness was proceeding to testify were not a part of the *res gestæ* and were therefore inadmissible. The objection was overruled and the witness permitted to state that the prosecutrix said that the

* See 38 Am. Rep. 366; *People v. Mayes* (66 Cal. 596), 56 Am. Rep. 126.

accused was the perpetrator of the outrage upon her. This was error.

The object of calling this witness was not to furnish original or independent proof to support the charge itself, but the sole purpose and effect of such evidence was to sustain the testimony of the prosecutrix — the principal witness.

We find in Bish. Crim. Proc. the following expression on this point: "The principal witness therefore in these cases stands in a particularly delicate situation before the jury; and the law has defined by what methods and within what limits her testimony may be supported or impeached. * * * After this principal witness has testified against the accused, the government may introduce witnesses to sustain her evidence of complaint made by her recently after the occurrence of the alleged outrage, together with evidence, if there is such, of marks of violence seen on her person. But according to the general doctrine, the particulars of the offense, as she stated them, and the name of the person charged by her with committing the crime, cannot thus be produced." And this doctrine is supported by frequent adjudications.

[Other points omitted.]

We are satisfied that the accused was seriously prejudiced by these erroneous rulings, and by reason of the same the case must be remanded.

It is therefore ordered, adjudged and decreed that the verdict of the jury in the lower court be set aside, and the sentence of the court be avoided and reversed, and the case remanded to be proceeded with according to law and the views herein expressed.

STATE V. NELSON.

(38 La. Ann. 942.)

Criminal law — "dangerous weapon."

A razor is not a "dangerous weapon" within a statute specifying "such as bowie-knives, pistols, dirks, or any other dangerous weapon."*

CONVICTION of carrying concealed weapons. The opinion states the case.

* See note 51 Am. Rep. 628.

M. J. Cunningham, attorney-general, and *J. C. Pugh*, district attorney, for State.

Pierson & Hull, for appellant.

WATKINS, J. The accused appeals from a judgment of conviction under the Revised Statutes, section 932, which declares that "whoever shall carry any weapon or weapons concealed on or about his person, such as bowie-knives, pistols, dirks, or any other dangerous weapons, shall on conviction," etc.

The indictment charges that the accused "did have and carry concealed on or about his person, a certain dangerous weapon called a razor, contrary to the form of the statute," etc.

He waived trial by jury, and elected to be tried by the judge.

In limine his counsel filed a motion to quash the indictment on the grounds, viz.:

1st. That carrying a razor is not carrying a concealed weapon.

2d. That a razor is not a dangerous weapon within the meaning of the law.

It seems the motion to quash was tried with the merits and was overruled, and a judgment of guilty entered.

At this stage of the proceedings the counsel for the accused filed a motion in arrest of judgment, in which he assigns as error apparent upon the face of the record the defects mentioned in his motion to quash, and the overruling of the same by the trial judge.

The record contains no part of the evidence adduced on the trial; and no bill of exceptions.

The only question therefore is whether defendant's motion to quash the indictment was well taken, or his motion in arrest should have been sustained.

It presents a matter of substance material to be averred in the indictment.

Is a razor a weapon within the intendment of the statute under which defendant was indicted?

The gravamen of the statute is the punishment of persons who carry "weapons" concealed on or about their persons.

The statute instances the following, viz., such as bowie-knives, pistols and dirks. The sentence then concludes with the qualifying phrase. "or other dangerous weapons."

It is plain that the carrying of a weapon concealed is the crime the statute contemplated. To bring the accused within its provisions, the indictment must charge that he had carried concealed on or about his person a weapon of the particular description enumerated, or some "other dangerous weapon."

In the judge's opinion, he says: "While the razor was not originally intended by the inventor and maker as a dangerous weapon, it has become one in common practice, and is more frequently carried and used as such than the bowie-knife, the dirk, or any other dangerous weapon, except the faithful revolver;" and after citing a few authorities, concludes "that a razor therefore, if carried as a weapon, is within the prohibition of the statute; * * * and while a razor may be used for other purposes, it is incumbent upon the State to show in the evidence that it was carried as a weapon."

"Any other view would defeat the purpose and intent of the law; for if a person can carry a razor concealed on or about his person as a weapon, he can carry a butcher-knife, carving-knife, or any other instrument of domestic use, however dangerous and deadly its character, on or about his person."

In our opinion, the meaning of the statute unmistakably is the carrying of a weapon *eo nomine* and concealed. It must be a dangerous weapon *per se*—such as a bowie-knife, pistol or dirk; and this must affirmatively appear upon the face of the indictment itself. If it does not, it is bad, and cannot support a conviction.

We do not regard the particular purpose to which the instrument is applied as exercising control over its character as a weapon.

Whether the instrument named is a weapon the trial judge should decide on a motion to quash, as upon every other essential ingredient of an indictment. This question being determined, the accused goes to the jury upon the evidence adduced under it. To decide otherwise would be to hold that the jury were competent to pass upon the validity of the indictment.

This must be valid in its incipency. It must set out the crime with which the accused is charged with precision and certainty. This cannot be supplied by proof, nor eked out by inference.

A razor is an instrument or implement appertaining to the toilet or shop. It has a well-known and specific use to which it is ordinarily applied. It is not known or usually sold in the market as a weapon. It may be quite as easily and conveniently carried in the

State v. Nelson.

pocket as a pen-knife, and when thus carried is effectually concealed from public open view. Under such circumstances the concealment of one would be just as pernicious as the other.

Conceding for the argument the full extent of the vicious habit of carrying a razor as a concealed weapon, mentioned by the judge, the cause of the State is not improved. This habit may be one of recent origin, confined to a limited extent of country, and perhaps one that is practiced by a certain class of citizens.

A statute prevails throughout the State, and includes within its provisions every individual inhabitant thereof. It would seem to follow, as a logical sequence to this argument, that in the parish of Red River the carrying of a razor concealed, where this local habit or usage prevailed, would be thus brought within the denunciation of the statute, while the carrying of a razor concealed by an inhabitant of some other parish of the State, where no such custom prevailed, would not.

It is argued that this court has placed an interpretation upon the words "a dangerous weapon," which supports the theory of the State.

In construing section 790, Rev. Stats., which declares that "if any person lying in wait, or in perpetration, or attempt to perpetrate, any arson, etc., * * * shall shoot, stab, or thrust any person with a dangerous weapon, etc.," this court said, in *State v. Lowry*, 33 Ann. 1224: "From this it appears, and we hold, that 'thrusting' a person may well include thrusting with 'an iron bolt, rod, or pin,' whether the point be sharp or not. 'Such an instrument may well be a dangerous weapon,' etc.

Conceding the correctness of that decision, and we do, does it follow that the carrying of "an iron bolt, rod or pin" concealed on or about the person, is the carrying of a dangerous weapon, in the sense of Rev. Stats., section 932?

If so, then the carrying concealed on or about one's person of any article which might be used as a dangerous weapon in a combat, whether it be an instrument or not, a stone, a bat, a ball, a pocket-knife, a rod, a bolt, or a bar, any thing with which injury might be inflicted, would become "a dangerous weapon;" and any person carrying any one of these articles concealed on or about his person, not "in open public view," would become *eo instanti*, liable to prosecution therefor.

The law maker, in our view, intended something more reasonable, and only denounced as a crime the carrying concealed dangerous

State v. Nelson.

weapons *eo nomine*, and not such articles or instruments as might be used in an assault.

In the brief of the attorney-general we find the following paragraph, viz: "The statement that carrying of a razor, concealed as a weapon, is a carrying of concealed weapons is calculated to direct the mind to the fact and the manner of the concealment, rather than to the intent and purpose with which it is carried." Again: "The statement of the carrying of a razor as a weapon is more correct, and directs the mind to the intent and purpose with which the razor is carried."

A ready answer to those suggestions is that neither "statement" conforms to the statute, which declares that "whosoever shall carry any weapon or weapons concealed."

The gist of the question is the carrying of a weapon concealed, and not the carrying of an instrument "concealed as a weapon," or the carrying of an instrument "as a weapon concealed."

The weapon, in the words of the statute, must be "such as bowie-knives, pistols, dirks, or other dangerous weapon."

State v. Martin, 31 Ann. 849, in which the court says: "To constitute the crime charged it suffices that a dangerous weapon be carried on or about the person; and it matters not that it be so carried with or without any actual intent."

The definition quoted in the brief of the attorney-general, from Worcester, is conclusive against the State. It is: "Instruments made on purpose to fight with are called arms, or weapons; such as are accidentally employed to fight with, weapons."

A legitimate deduction from this is that a razor belongs to the latter class, i. e., such as are accidentally employed to fight with, and not to the class of instruments "made on purpose to fight with."

The razor might be a weapon if accidentally or actually employed to fight with, as in *State v. Lowry*, but it certainly is not such a dangerous weapon as is contemplated by the statute.

The motion to quash, or the motion made to arrest the judgment should have been sustained.

It is therefore ordered, adjudged and decreed that the judgment and sentence pronounced thereunder be annulled and set aside; and it is further ordered, adjudged and decreed that the indictment be quashed and the accused discharged.

FENNER and TODD, JJ., dissenting.

CASES
IN THE
SUPREME COURT
OF
IOWA.

EVERETT V. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

(88 Iowa, 18.)

Railroads—statute—time to procure tickets.

Under a statute permitting railroad companies to make an extra charge for fares paid in the cars, when a reasonable time has been allowed to procure tickets before the starting of the train, it is not necessary to keep open the ticket office at a small station until the very moment of starting.

ACTION for wrongful ejection from a railroad train. The opinion states the case. The defendant had judgment below.

Snapp & Pusey, for appellant.

Wright, Cummins & Wright and Wright, Baldwin & Haldane, for appellee.

ROTHROCK, J. I. It is provided by section 2 of chapter 68 of the laws of 1874 (Miller's Code, 347) that "a charge of ten cents may be added to the fare of any passenger, where the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train." The ground upon which the plaintiff based his refusal to pay the ten cents demanded by the conductor was that he was prevented from procuring a

Everett v. Chicago, Rock Island and Pacific Railway Company.

ticket because the ticket office was closed when he presented himself for the purpose of purchasing a ticket. The facts are that the plaintiff is the owner of a large farm some five miles from Weston. His residence is at Council Bluffs, and he made frequent visits to his farm, going by rail by the way of Weston. He knew that the defendant was authorized to collect ten cents, in addition to the ticket rate, from passengers who neglected to purchase tickets at the station. Weston is a small and unimportant station at which an inconsiderable amount of business is done by the railroad company, either in freight or passenger traffic. As is usual at such places, the company keeps no assistant for the agent; and when a train arrives, the agent leaves the ticket office, and goes upon the platform of the station to transact his business with the train; such as seeing to the loading of the mail on the train, the receipt and delivery of baggage and express packages, and the like. The plaintiff came in from his farm in the morning, and stopped at a store in the village until he heard the whistle of the train as it approached the station, when he went to the station, and arrived there just before the train came to a full stop. The ticket agent had the office open for a considerable time before the train arrived, and sold tickets to passengers, and he did not leave the office until the engine to which the train was attached had passed the office window, when he went on the platform to attend to his train duties. The train stops at that station only long enough to do the train business and allow passengers to get on and off the cars.

The court permitted all these facts to be shown to the jury, and charged the jury to the effect, that if under all these facts and circumstances, a reasonable time was given to passengers to purchase tickets before the departure of the train, the conductor was authorized to demand the extra ten cents of the plaintiff. One of the instructions to the jury was as follows: "(6) The fact, if it is a fact, that the plaintiff applied at the defendant's ticket office at Weston to purchase a ticket at a time when it was closed, does not of itself alone necessarily show that opportunity was not given within a reasonable time before the departure of the train for the purchase of tickets; nor can it be said, as matter of law, that the defendant had a right to close its ticket office as soon as the train arrived at the station. The question, what is a reasonable time for the procuring of tickets before the departure of trains from a station depends principally on the requirements, convenience and demands

Everett v. Chicago, Rock Island and Pacific Railway Company.

of the public at that particular station. It was the duty of defendant to keep its ticket office open, and to keep a competent man there to sell tickets at such times as would reasonably, fairly and fully accommodate the public in the matter of procuring tickets. Regard should be had to the importance of the station, and the number of people who have occasion to purchase tickets there; and the ticket office should be kept open at such times as people in general who travel by rail are in the habit of repairing, and find it convenient to repair, to the station to purchase tickets and get aboard the train."

Counsel for appellant insist that this and other instructions given by the court to the jury are erroneous. They claim that under a proper construction of the statute above cited, it was the duty of the railroad company to keep its ticket office open up to the time of the departure of the train; in other words, they claim that by the very terms of the statute the office must be kept open for the sale of tickets just so long as it is possible for passengers to purchase tickets and board the train. Assuming this to be the meaning and intent of the statute, they contend that it was error for the court to submit to the jury the question whether, under the facts, the office was kept open a reasonable time in which passengers might procure tickets. We do not think this position is sound. In our opinion, it was proper to allow the defendant to introduce evidence of the character of the station, and whether the facilities extended to the travelling public to purchase tickets were such as were required for the convenience of the public. It would be a most unreasonable requirement to impose upon the defendant the burden of employing two persons to attend to the station in order that the ticket office might be kept open for the one or two minutes which a train is required to stop at such a station, in order to accommodate the exceptional cases of passengers who may for any reason arrive at the station after the arrival of the train. Regard must be had to the orderly transaction of the business of the station, taking into consideration the necessary and proper facilities extended to persons having occasion to travel on the trains or transact other business with the company. It is absolutely necessary that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each

Aiken v. Western Union Telegraph Company.

other. But the language "before the departure of the train" does not require that the office shall remain open up to the instant the train moves off. The question is, might the passenger have procured a ticket within a reasonable time before the departure, and not up to the very moment when the wheels began to move.

[Omitting minor points.]

We think the judgment of the District Court should be affirmed.

Judgment affirmed.

AIKEN v. WESTERN UNION TELEGRAPH COMPANY.

(66 Iowa, 31)

Telegraph — unreported message — mistake — burden of proof.

Under a stipulation that a telegraph company shall not be liable for mistake in transmission of unreported messages, beyond the price received for sending, a plaintiff may not recover beyond this limit for such a mistake unless he affirmatively shows want of care or skill.*

ACTION for mistake in a telegram. The opinion states the case. The plaintiff had judgment below.

W. F. Thummel, for appellant.

N. B. Moore, for appellee.

BECK, J. I. The plaintiff, who was a dealer in live-stock, sent to his brokers, William Young & Co., Chicago, a telegraphic message, in the following language: "What will fifteen hundred young western cattle, corn fed, bring?" The brokers gave to defendant for transmission a reply to this dispatch in these words: "If good quality, five eighty-five to six cents." The reply, as transmitted and delivered to plaintiff reads as follows: "If good quality, give eighty-five to six cents." Upon receiving this dispatch, plaintiff, relying thereon, purchased a large number of cattle, giving therefor \$5.75 per 100 pounds. He understood the reply to direct him to give for cattle of the description specified \$5.85 to \$6 per 100 pounds. The cattle thus purchased were shipped to Chicago, and sold by his brokers at the ruling rate for such cattle,—\$5.90 per 100 pounds. The reply, as written by the brokers, and delivered

* See *Hart v. West. Un. Tel. Co.* (66 Cal. 579), 56 Am. Rep. 119.

Aiken v. Western Union Telegraph Company.

to defendants, correctly stated the market price of cattle of the quality mentioned.

Plaintiff lost \$309.80 upon the shipment, and brings this action to recover that sum. The reply sent by the brokers was written upon paper which contained a printed condition to the effect that the defendant "shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." The message involved in this case was not repeated. The condition printed upon the message provides that defendant may charge for repeating a message one-half the regular rate in addition thereto. The message was received and sent subject to these conditions.

[Minor points omitted.]

IV. The District Court gave to the jury the following, among other instructions.

"(1) That the burden of proof is on the plaintiff to establish his claim or cause of action against the defendant, as alleged in his petition, and before he would be entitled to recover he must prove, by a preponderance of the evidence, that he sent and received the message described in his petition; that the defendant made the mistake in the message transmitted by said Young & Co., of Chicago, as alleged in his petition; that he relied and acted upon the message as he received it from the defendant; and that he has sustained damages in manner as alleged in his petition by reason of said mistake.

"(2) You are instructed that the regulation in the printed message, requiring it to be repeated in order to avoid mistakes, is a reasonable one, and will exempt the defendant from liability for mistakes occurring in the transmission of messages which are occasioned by uncontrollable causes, such as atmospheric electricity. Still, this regulation would not exempt the defendant from liability on account of mistakes occurring through or on account of negligence or carelessness of the agents or employees of the defendant. Notwithstanding this regulation or special agreement, it would be the duty of the defendant to employ skillful operators, use proper instruments, and through its agents and employees to exercise ordinary and reasonable care in the transmission of messages; and in this case, if you find and believe from the evidence that there was a mistake made by the defendant in the message sent by said Young & Co. to the plaintiff, and that the plaintiff relied and acted

Aiken v. Western Union Telegraph Company.

on the message as he received it from the hands of the defendant, and has sustained damages thereby, then you should find for the plaintiff, unless you find that said mistake was occasioned by and through some uncontrollable cause, which a skillful operator, by the use of ordinary and reasonable care, could not have avoided; and the burden would be on the defendant to show that the mistake was caused by some uncontrollable cause, which a skillful operator, with a good instrument, with reasonable care and caution, could not have avoided."

This instruction holds, in effect, the plaintiff is entitled to recover upon showing, with other matters which need not be mentioned, that the defendant's employees made the mistake shown in the pleadings and evidence; that the condition of the contract for the transmission of the message relieved defendant of liability for mistakes occurring from uncontrollable causes, but did not exempt it from liability for the negligence of its employees; and that the burden of proof rests upon defendant to show that the mistake occurred from uncontrollable causes. The instruction, in this regard, is in conflict with the doctrine announced by this court many years ago, and ever since recognized, in *Sweetland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433; s. c., 1 Am. Rep. 285. The condition of the contract for transmission of the message in that case is substantially like the one involved in this. This court then held that "the plaintiff, to recover, must prove something more than a mistake and damage. He must show that the mistake was caused by the fault of the defendant, and that it might have been avoided if the defendant's instruments had been good ones, and if defendant's agent had possessed the requisite skill, and exercised the proper care and diligence, in respect to the transmission and receipt of the message in question."

The instruction above quoted not only imposes liability upon defendant upon simple proof of the mistake, without evidence of negligence, but imposes upon defendant the burden of proving that there was no negligence, for the reason that the mistake occurred through uncontrollable causes. It makes the defendant liable without proof of negligence, and does not permit escape of liability, except upon proof made by defendant that there was no negligence. The instruction is not only in conflict with the prior decision of this court, but is clearly wrong upon principle.

For the errors in it, the judgment of the District Court is reversed.

Judgment reversed.

HUFF V. AULTMAN.

(89 Iowa, 71.)

Civil damage act — contributory negligence.

In an action by a wife under the civil damage act, for furnishing intoxicating liquors to her husband, it is not proof of contributory negligence to show that she was in the habit of letting him have portions of his wages previously deposited with her, having reason to believe he would spend them for such drink.

ACTION under civil damage act. The opinion states the case. The plaintiff had judgment below.

D. O. Finch and Parsons, Perry & Sherman, for appellant.

W. H. McHenry, Jr., and Barcoft & Bowen, for appellee.

REED, J. Defendants are the proprietors of a brewery in the city of Des Moines, and at the time in question they kept a bar in their building at which they sold beer by the glass. It was proved on the trial that on the evening of the 5th of February, 1884, plaintiff's husband was at the brewery, and that he then purchased and drank one or more glasses of beer. It was also proved that for two years before his death he had been in the habit of becoming intoxicated nearly every day, and there was evidence which tended to prove that he was intoxicated on the evening in question. He left defendant's place about 9 o'clock, going in the direction of his home. The next morning his dead body was found on the ice beneath the bridge, between defendants' brewery and his home. Plaintiff's theory is that he attempted to cross the bridge while in a drunken condition, and fell through a hole therein, and was killed by the fall upon the ice below, and there was evidence from which the jury were warranted in finding that his death occurred in that manner. He was a day laborer, working chiefly on the streets of the city, and ordinarily earned from \$30 to \$40 per month.

Plaintiff was a witness in her own behalf, and on cross-examination she testified that it was the custom of her husband, when he received his wages, to give a portion of the money to her, but that it frequently happened that after having given her money, he would come to her and request her to return a portion of it to him, which

she would do, and that this had been their custom for many years; and she admitted that she knew when she furnished him money on such occasions that he intended to purchase intoxicating liquors with it, and that he frequently became intoxicated on liquors purchased with money so obtained from her. She testified that she gave him the money to keep him in a good humor, and keep him from getting angry at her. Counsel for defendants contend that upon this state of facts plaintiff is not entitled to recover for the injury of which she complains. Their position is that as she furnished him the money with knowledge of his habits, and of the use to which he intended to put it, she thereby contributed to his intoxication, and for that reason the law will not afford her a remedy for the injury which she sustained in consequence of his intoxication. They asked the Circuit Court to instruct the jury in accordance with that view. But the court, as we infer from the record, left it to the jury to say from the evidence whether plaintiff voluntarily contributed to the intoxication of her husband, and instructed them that if she did so, she was not entitled to recover. In that respect the Circuit Court followed the holding of this court in *Engleken v. Hilger*, 43 Iowa, 563. The correctness of the ruling in the abstract is not questioned by counsel. They insist in effect however that it should have been determined as matter of law, from the undisputed evidence, that plaintiff had precluded herself from all right of recovery for the injury complained of, by her acts in voluntarily delivering the money to her husband while knowing the use to which he intended to appropriate it. But we are of the opinion that the question presented was one upon which plaintiff was entitled to have the verdict of the jury. It cannot be said that the conclusion that she voluntarily contributed to the intoxication of her husband is the only deduction which can fairly or reasonably be drawn from the facts proven. It must be borne in mind that the money, while it was in plaintiff's possession, in fact belonged to her husband. It was his earnings, and he had a right to the possession and control of it. He was under a moral and legal obligation, it is true, to afford a support for his wife and children, but that fact did not vest her with the title or right of possession in the money he earned. It must be borne in mind, also that the probable result of a refusal by her to deliver the money to him at his request, on any occasion, would have been the refusal by him to pay any portion of his future earnings to her. She was to

Poggensee v. Mutual Fire, Lightning and Tornado Insurance Company.

some extent under the compulsion of necessity. She was dependent on the earnings of her husband for support. But his habits were such that those earnings, except the pittance which she was able to obtain and keep from him, were squandered at the saloon and brewery; and on every occasion when he made a demand upon her for a portion of the money he had given her she was probably remitted to a choice between the surrender of the sum demanded and the loss of the whole of his earnings in the future. It was not for the court to say that she necessarily consented to his drunkenness because she chose the lesser of these evils. We think the question was properly submitted to the jury, and their finding upon it is abundantly sustained by the evidence.

[Omitting minor points.]

Judgment affirmed.

**POGGENSEE V. MUTUAL FIRE, LIGHTNING AND TORNADO
INSURANCE COMPANY.**

(80 Iowa, 157.)

Insurance — tornadoes — evidence.

In an action on a policy of insurance against tornadoes, it is competent to show the effect of the storm on other property in the neighborhood, to determine whether it was a tornado.

ACTION on a tornado insurance policy. The opinion states the case. The plaintiff had judgment below.

Shaw & Kuchule, for appellant.

E. K. Burch, for appellee.

ADAMS, C. J. The policy sued on is in the German language. The plaintiff averred in his petition, that by the policy, he was insured against loss by tornado; that the policy covered a certain stallion, and that the stallion was killed by a tornado. The horse, on the night of his death, had been tied in a stable on the plaintiff's premises. While he was so tied there occurred an extraordinary rain-storm, accompanied by some wind, and the stable was swept away, and the horse was found dead about eighteen rods from where the stable had stood. Upon the trial evidence was introduced tending to show that the wind which accompanied the

Poggensee v. Mutual Fire, Lightning and Tornado Insurance Company.

rain was less than a tornado. Thereupon the plaintiff filed an amendment to his petition, averring, in substance, that the policy, properly translated, provided for insurance against wind-storms. The evidence however showed that the policy, properly translated, did not provide for insurance against all kinds of wind-storms, but only against winds of extreme violence; and the court instructed the jury, that to justify a verdict for the plaintiff, it would be necessary for them to find that the loss was caused by a tornado, hurricane or irresistible wind-storm.

I. The plaintiff testified as a witness in his own behalf. After having testified that his stable was blown down by wind, he was asked, on cross-examination, a question in these words: "What other buildings in your immediate neighborhood were destroyed by wind at that time?" The plaintiff objected to the question as immaterial, incompetent and not in cross-examination, and the court sustained the objection. In our opinion, the question should have been allowed. If the witness had answered that no other buildings in the immediate neighborhood were blown down, the answer would, we think, have had some tendency to show that he was mistaken, or had testified falsely in regard to the stable. This seems to us to be especially so, in view of the evidence in respect to the extraordinary character of the water-fall.

II. One Saggau was called as a witness by the plaintiff. He testified that he lived about twenty-five rods from the plaintiff; that a small house of his, about six or seven rods from the plaintiff's, was moved a little, though he did not know whether it was done by the water or wind; that he saw the debris of the plaintiff's stable, and that some limbs of trees were broken off about as large as his thumb; also that boards covering a brick-yard were blown away and some timbers broken. He was then asked a question in these words: "Do you know of any other damage in the immediate neighborhood done by the wind that night?" To this question the plaintiff objected as immaterial, and not in cross-examination, and the court sustained the objection. This witness was in the midst of the scene of the alleged tornado. The damage which he testified to having seen did not necessarily show that the wind amounted to a tornado, and the jury would not have been justified in inferring that he saw more than he testified to. We cannot say therefore that the exclusion of the question was reversible error. Still we think, in view of the importance of the witness, that it

Poggensee v. Mutual Fire, Lightning and Tornado Insurance Company.

would have been better to allow the defendant to show distinctly the limit of the damage, as observed by this witness.

III. The defendant called as a witness one Schocker. He testified that he lived 120 rods north of the plaintiff's, and that he had stables and straw-stacks where he lived. He was then asked by defendant a question in these words: "What, if any, damage was done, or evidence of wind was there, around the stables and straw-stacks?" The question was objected to as immaterial and incompetent, and the court sustained the objection. It had already been proven that the wind was blowing from the north or north-west. If the fact was that there was no evidence of wind around Schocker's stables and straw-stacks, 120 rods north of the plaintiff's, such fact, we think, would have tended, at least in a slight degree, to show that at the plaintiff's the wind did not amount to a tornado, and that the destruction of his stable was due, either to its own frailty, or to the action of the water. We think that the question should have been allowed.

IV. One McHenry was called by the defendant as a witness, who testified to seeing a grove near plaintiff's house after the alleged tornado. He was asked a question in these words: "Did you notice any trees having been blown down?" This question, upon objection by the plaintiff, was excluded. We think it should have been allowed. Where a wind has not left behind it the ordinary indications of a tornado, there is some ground for supposing that it did not amount to a tornado. It is true that the path of a tornado is sometimes very narrow and sharply defined. The fact then that trees in a grove near the plaintiff's stable were not blown down would not have shown necessarily that there was not a tornado at the plaintiff's stable; but we think that it was a fact which the defendant was entitled to show as having, at least, some slight bearing in the case.

V. One Hendrickson testified that he lived a mile west of the plaintiff. He was then asked by defendant a question in these words: "Do you know of there being a severe wind or water-spout over north-east of you that night?" He answers as follows: "Rain! I never saw the likes of it,—so heavy." This answer, upon the plaintiff's motion, was stricken out. As there was some evidence tending to show that the plaintiff's stable might have been destroyed by water, we think that Hendrickson's testimony in regard to the character of the rain should not have been excluded.

Judgment reversed.

WAKEMAN V. CHAMBERS.

(69 Iowa, 100.)

Witness — privilege — selling intoxicating liquors.

A purchaser of intoxicating liquors, under the prohibitory law, is not a participant in the crime, nor entitled to excuse himself from testifying as to the purchase.

CONTEMPT proceedings. The opinion states the case.

D. C. Cloud, for appellant.

H. J. Lauder, for appellee.

SEEVERS, J. It became material in a judicial proceeding before the defendant, a justice of the peace, to ascertain whether one Lang had sold intoxicating liquors contrary to law, and the plaintiff being lawfully summoned as a witness, was asked the following questions. "What is your business? A. Proprietor of the Eastern House. * * * Have you bought any beer of Charles Lang within four months last past? A. I refuse to answer. Why do you refuse to answer? A. I refuse to answer. Have you, by yourself or any other person, bought beer by the keg, or any other intoxicating liquor, of said Charles Lang, within four months last past? A. I refuse to answer. Why do you refuse to answer? A. I refuse to tell; I refuse to answer on the ground that my answer would tend to criminate me, and I am so instructed by my attorney." For refusing to answer the foregoing questions the justice adjudged that the plaintiff was in contempt, and we are required to determine whether the District Court erred in holding that he was not.

It is provided by statute that "all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, * * * must hereafter be punished as principals." Code, § 4314. The distinction between accessories before the fact and principals is abrogated by statute, and a public offense includes both misdemeanors and felonies. Code, § 4103. It is contended that as the seller of intoxicating liquors contrary to law is guilty of a public offense, the purchaser is also because he aids in the commission of

Wakeman v. Chambers.

such offense. It is undoubtedly true that if there was no one to purchase there could not be a sale, nor an offense consummated; and yet it is equally true that the statute creating the offense does not provide or contemplate that the purchaser is guilty of any offense whatever. The contrary intent, we think, clearly appears. The statute was passed in view of the well known fact that persons who purchase and use intoxicating liquors frequently become intoxicated, and a few at least become confirmed drunkards.

The object of the statute is twofold, the protection of the people of the State, and that class of persons likely to become purchasers, as a protection against themselves. Hence it is provided that a person found in a state of intoxication shall be deemed guilty of a misdemeanor, and be punished as prescribed in the statute. But the person so found intoxicated is invited to give information, under oath, when, where and of whom he purchased or received the liquor, and thereupon the magistrate is authorized to remit the penalty prescribed for being in a state of intoxication. It cannot be supposed that the legislature, in thus inviting the intoxicated person to inform on the seller, contemplated that he thereby criminated himself in the crime of aiding and abetting in the sale, and was liable to be punished as a principal. The sale of intoxicating liquor is lawful at common law, and it becomes unlawful simply because the statute so provides. Under the statute the sale, or keeping with intent to sell, is a public offense, because the statute so declares. The statutory crime is bounded by the statute creating it, and the statute operates on, and has force and effect against the person therein named, and no others. As the prohibitory statute does not provide that the purchaser is guilty of any crime, it seems to us this fact practically ends the inquiry. If such had been the intent, it would certainly have been so provided in express terms. So far from this being so, the implication is clearly the other way. The prohibitory statute does not regard the purchaser as an aider and abettor in any criminal act, and it has been so held, under similar statutes, in *State v. Rand*, 51 N. H. 361, and *Com. v. Willard*, 22 Pick. 476. It is said however that the decision in this last case would have been the other way if the crime had been of greater magnitude. We do not think this is so, and this clearly appears from the subsequent case of *Com. v. Downing*, 4 Gray, 29; *Cobb v. Farr*, 16 Gray, 597; *Walan v. Kerby*, 99 Mass. 1; *Adams v. Goodnow*, 101 Mass. 81.

In *Doran's* case, 2 Pars. Eq. Cas. (Penn.) 467, the statute made it a crime for any person "to buy, use or expose to sale" tickets in lotteries, and therefore it was held that the purchaser could not be compelled to testify, for the reason that he himself was guilty of a crime. The only case to which we have been referred which seems to sustain the ruling of the District Court is *State v. Bonner*, 2 Head, 135. A statute in Tennessee prohibited the sale of liquor by slaves, and it was held in the cited case that a white man who purchased from a slave committed a criminal offense. We think that both on principle and the authority of adjudged cases under statutes similar to ours, the better rule is otherwise.

It should be remembered that the prohibitory statute has been in force in this State for many years, and it is undoubtedly true that there have been many convictions thereunder on the evidence of the purchaser alone; for ordinarily, no other evidence can be procured; and this is the first instance, to our knowledge, where the right of the State to such evidence has been questioned. Nor are we advised that a single prosecution against the purchaser for aiding in the commission of a crime was ever commenced, and this has a strong tendency to show what has been generally regarded as the proper construction of the statute.

[Omitting minor points.]

Reversed.

PHILLIPS V. WATERHOUSE.

(88 Iowa, 130.)

Water and water-courses — surface water — street lots.

The owner of a city lot may turn the rain from it to the adjacent street, although it may injure a neighboring lot below grade.

ACTION for flooding. The opinion states the case. The plaintiffs had judgment below.

Blake & Hornel, for appellant.

A. R. West and *Smith & Powell*, for appellees.

SEEVERS, J. There is no dispute as to the facts. The plaintiffs are the owners of a lot on which is situate the Pullman House, in

Phillips v. Waterhouse.

block 23, in Cedar Rapids. The block, or rather half block, is bounded by First avenue, Third and Fourth streets, and an alley which runs parallel with the avenue. The defendant owns a lot in the same block, situate at the corner of the avenue and Third street, and it is bounded in the rear by the alley. The defendant, in 1878, erected on his lot the Grand Hotel, which fronts on the avenue and Third street. The building is 80 by 140 feet, and occupies all the ground belonging to the defendant. The building is so constructed that all the water falling thereon is discharged by pipes or spouting on the alley in the rear of the building, and from thence it flows along the alley for a short distance, and then a large portion of it, at least, flows over intervening lots, to the premises of the plaintiffs, and thereby the nuisance is caused. The plaintiffs' premises are lower than the premises of the defendant. The distance between them is 160 feet, and there is a descent from Fourth street, which continues past plaintiffs' premises, and then there is an ascent before the defendant's premises are reached. The rear portion of the plaintiffs' lot is from four to five feet lower than First avenue, and is from two to three feet lower than the grade of the alley. A portion of the alley has been filled up to grade. The evidence fails to show whether the water discharged from the defendant's building would or would not flow on the plaintiffs' lot if it had been filled up to the grade of the alley. The defendant's building could have been constructed so that the water could have been discharged on Third street. All the lots on the half block have buildings thereon, but the whole ground is not thus occupied.

Under the foregoing facts, are the plaintiffs entitled to recover? is the question we are required to determine. The defendant had the undoubted right to erect a building covering his whole lot. Water falling thereon must be discharged therefrom, and subject only to municipal control, the defendant had the right to discharge such water on the street or alley. He had precisely the same right in this respect as he had the right to walk on the street or alley. He had the further right to so construct the building as to cause the water to flow and be discharged at one or more places. Of necessity this must be so. It is well settled by authority, we think, that no one can divert a stream of water to the prejudice of another, nor can he collect surface water into a reservoir or stream, and precipitate it on to the premises of another. *Fletcher v. Rylands*, L. R., 1 Exch. 265; *McCormick v. Kansas City, St. J.*

& C. B. R. Co., 70 Mo. 359 ; s. c., 35 Am. Rep. 431 ; *Noonan v. City of Albany*, 79 N.Y. 470; s. c., 35 Am. Rep. 540 ; *Livingston v. McDonald*, 21 Iowa, 160.

It is equally clear, we think, that an owner of a lot in a city has the right to improve it in such manner as he deems proper, either by changing the surface or the erection of buildings, and such right is in no respect modified by the fact that his own land is so situated with reference to that of adjoining owners that the mode of improvements adopted will cause water which may accumulate thereon by rains to flow over the lands of others in greater quantities, or in other directions than they were accustomed to flow. *Gannon v. Hargadon*, 10 Allen, 106. The same rule applies to a city, when grading streets. *Wilson v. Mayor*, 1 Denio, 595; s. c., 43 Am. Dec. 719; *Lynch v. Mayor*, 76 N. Y. 60; s. c., 32 Am. Rep. 271; *Fredburg v. Davenport*, 63 Iowa, 119; *Morris v. Council Bluffs*, 67 Iowa, 343.

In the construction of his building it was the right, if not the duty, of defendant to construct it with reference to the established grade of the streets and alleys, and it will be presumed that he did so, as there is no evidence to the contrary. We understand that the alley where the water fell on it had been raised to grade, and we have no hesitation in affirming the right of the defendant to discharge the water which fell on his building at the place he did, in the absence of any regulation of the municipality directing otherwise. The plaintiffs' premises were below grade. As between them and the city they were required, in order to protect themselves from the accumulation of surface water, to raise the level of their lot. The same principle must obtain between the parties to the action. No more water fell on the building than would have fallen on the ground on which it stood. The defendant did nothing to accumulate the water. At most, by the improvement of his lot, he changed the direction of the water falling on his own premises, and he caused this water to be discharged in the alley at grade. This, we think, he had the right to do. The escape of the water from the alley at grade, to the injury of the plaintiffs, was due to the fact that their premises were below grade. The defendant was not bound, in the absence of municipal direction, to so construct his building as to cause the water to be discharged on Third street, nor was he bound to construct a sewer or drain to carry off the water which fell on his building. *Vanderwiele v. Taylor*, 65 N.

Carroll County v. Ruggles.

Y. 341. The defendant did not precipitate the water on the plaintiffs' premises, but on the alley, and for the purposes of this case, we must assume, that if plaintiffs' lot had been raised to grade, no water from the alley would have escaped therefrom to their injury. The court therefore erred in rendering judgment for the plaintiffs.

Judgment reversed.

CARROLL COUNTY V. RUGGLES.

(30 Iowa, 266.)

Bond — conditional signing by surety.

Where a public officer procured the signatures of sureties on his official bond on the assurance that he would procure certain others, which he failed to do, the signers cannot evade liability if the obligee had no notice of the condition and the bond was complete in form.*

ACTION on an official bond. The opinion states the case. The plaintiff had judgment below.

George W. Paine and *M. W. Beach*, for appellants.

E. M. Powers and *I. J. McDuffie*, for appellee.

ROTHROCK, J. W. R. Ruggles was elected treasurer of Carroll county at the general election in the year 1881. He was re-elected at the general election in 1883, and the bond upon which this suit is brought was approved by the board of supervisors at their meeting in January, 1884. In July, 1884, Ruggles absconded, and it was found that he was a defaulter in the sum of about \$24,000. There are various defenses pleaded by the sureties upon the bond, which we will proceed to consider. Some of them may properly be disposed of in a very brief manner.

[Minor questions omitted.]

On the 16th day of November, 1883, Ruggles, the treasurer, called upon the county auditor, and requested a blank bond, that he might procure sureties thereto. The auditor inserted in the blank a penalty of \$100,000, and filled other blanks, excepting the blank in the body of the instrument for the names of the sureties,

* See *Nash v. Fugate* (82 Gratt. 595), 84 Am. Rep. 780.

Carroll County v. Ruggles.

Ruggles took the oath of office before the auditor on the same day, which oath was indorsed on the bond, and the blank bond was delivered to him. It will be observed that this was several weeks before the bond was approved. The sureties, being fourteen in number, reside in different parts of Carroll county. Ruggles procured their signature to the bond by personal application to them. Some of them were procured at the houses of the sureties, and others at stores and other places where Ruggles happened to meet them. The amount named in the bond being large, the matter of the undertaking by the sureties was fully discussed between the sureties and Ruggles. In all, or nearly all, of these interviews with the sureties, Ruggles assured them that he would procure a large number of the substantial citizens of the county to sign the bond, and in most instances, he named certain persons who he stated had promised to become sureties; and he assured those whose names he obtained that he would procure the names of others, naming them. The sureties signed the bond with this understanding, and intending to be liable only upon the condition that the other names should be procured by Ruggles. But Ruggles failed to keep his agreement. He did not procure the signatures of many persons whom he promised the defendants he would procure, and upon which promise the defendants relied. The blank in the body of the bond for the names of the sureties was not filled until all of the defendants had signed their names. The blank was then filled with the names, excepting that of W. F. Minchen, whose name was not inserted in the blank. An affidavit of all the defendants but Minchen, justifying as to their qualifications as sureties, appeared upon the bond as having been made and sworn to before a notary public on the 7th day of January, 1884. The affidavit of Minchen was made before the clerk of the District Court on the 8th day of January, and on that day the bond was approved by the board of supervisors.

It will be seen from the foregoing statements of facts that when the bond was presented to the board for approval it was complete in every respect, and in the usual and proper form, with the single exception that the name of Minchen was not inserted in the body of the instrument. It is claimed by appellants that as the bond was not to be delivered to the county without the additional names which Ruggles was to procure, the delivery and approval by the board was without authority from the sureties, and created no bind-

Carroll County v. Ruggles.

ing obligation against them. There is a large number of authorities cited by counsel for both parties upon the question of law arising upon these facts. Many of these authorities are not of much aid in the determination of the question, because they are not entirely in point. It appears, also, that such as are applicable to the question are not in accord. But our examination of them has led us to the conclusion that the great preponderance of authority, and the better principle, leave but little doubt that the sureties are liable. Indeed we doubt if any case can be found where a bond such as this appeared to be upon its face, and which was signed by the sureties in blank — that is, without the names of others inserted in the bond who were to be procured as sureties — has been held invalid because the names of the sureties were procured by the principal upon condition that he would procure others to sign the instrument.

The case of *Dair v. United States*, 16 Wall. 1, is precisely in point. The defense of the sureties was the same in that case as in this. The bond was a blank. The name of the surety to be procured as a condition was not in the bond when the sureties signed their names. It was held that the defendants were liable, and the cause is distinguished from *Pawling v. United States*, 4 Cranch, 219, in which the additional sureties to be procured were named on the face of the bond. In *Dair's* case one Cloud was to be procured as a co-surety. The court says: "If the name of Joseph Cloud appeared as a co-surety on the face of this bond, the estoppel would not apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the government, who would have been put on inquiry to ascertain why Cloud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things."

The case of *Brown v. Perkins*, 42 Mich. 501, was a suit on a guardian's bond. The bond was drawn up on a printed form, and filled in with all but the names of the obligors. It purported to be drawn to bind the guardian as principal, and the word "sureties" was partly printed and partly written, with a blank for their names not filled in. Brown, the surety, signed the bond, while no name was inserted as surety, and he offered to show that when he had signed it he gave it to the guardian with an agreement that he should procure the signature of one Withey as another surety, and that the bond should not be used without Withey's signature; that the

guardian did not procure Withey's signature, but took the bond to the judge of probate, who wrote in Brown's name, and changed the word "sureties" to "surety," and made an order of approval. It was held that the surety was liable upon the bond. And see also, *McCormick v. Bay City*, 23 Mich. 457; *State v. Peck*, 53 Me. 284; *State v. Pepper*, 31 Ind. 76; *Millett v. Parker*, 2 Metc. (Ky.) 608.

The defendants, among other cases, rely upon *Daniels v. Gower*, 54 Iowa, 319. That was an action against sureties upon a non-negotiable promissory note, and it was held that when an instrument of that kind was signed by sureties, and deposited with a stranger to the note, to be delivered upon a certain condition, and was delivered by the depositary to the principal maker, and by him to the payee, in violation of the condition, the delivery was not binding upon the sureties, and the note against them was not enforceable. It is true, it is said in that case that the principle involved in cases arising upon official bonds is very nearly the same. But the question as to the rights of sureties upon official bonds was not before the court, and what is said in the opinion in relation thereto was not essential to the determination of the case.

The case of *Pepper v. State*, 22 Ind. 399, cited in the opinion, is not in point in this case, because in that case the names of certain persons were inserted in the body of the bond, and a part only of such names were afterward signed to it. It was a case similar to *Pawling v. United States*, *supra*.

Our examination of this question in this case has convinced us that the rights of parties of official bonds are not just like the rights of parties to purely personal transactions. A board of supervisors should not be required to compel the attendance of sureties to official bonds, to ascertain whether their names were affixed with conditions. They do not even have the power to compel such attendance. The time and place for the approval of such bonds are fixed by law. The board ought not to be expected to follow the principal over the county, and seek out and interview the sureties upon the subject of their obligation. It was the duty of the sureties to see that the principal in the bond, who was their agent, and who undertook to procure the additional sureties, performed that duty, and in the event of his failure to do so withdraw from the bond before its approval. When the bond is in proper form, there is nothing to apprise the board of supervisors of any conditions or limitations upon the obligation of the parties thereto, and sureties

Burns v. Chicago, Milwaukee & St. Paul Railway Company.

ought not to be allowed to wait until a defalcation occurs to make known and avail themselves of private stipulations and conditions between themselves and their principal. We have no doubt that nearly every official bond now in force in this State, including bonds of public officers, executors, administrators and guardians, is as vulnerable to a defense of this kind, real or assumed, as the bond in suit; and if we were to hold that such a defense is available to a surety, it would in our opinion tend very greatly to impair the value of official bonds. As is said in *Dair v. United States*, *supra*: "It is easy to see if the obligors are at liberty, when litigation arises and loss is likely to fall upon them, to set up a condition unknown to the person whose duty it was to take the bond, and which is unjust in its result, that the difficulties of procuring satisfactory indemnity from those who are required by law to give it will be greatly increased. Especially is that so since parties to the action are permitted to testify."

Judgment affirmed.

BURNS V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(89 Iowa, 450.)

Negligence — contributory — presumption.

An experienced brakeman, when last seen alive, was setting the brake on a freight car. The train separated in front of him and he was found on the track run over and killed. *Held*, that this proof justified the submission of the question of contributory negligence to the jury. (*See note, p. 229.*)

ACTION for death of plaintiff's son. The opinion states the case. The plaintiff had judgment below.

Burton Hanson and Noble & Updegraff, for appellant.

S. P. Adams and A. Chapin, for appellee.

SNEEVERS, J. The plaintiff's son was a brakeman on a freight train in the employ of the defendant. The defendant was moving a train consisting of seventeen or eighteen freight cars, westward from McGregor toward Austin. There were three brakemen on the train. Strang was head, the deceased the middle, and Allen the rear brakeman. There is on the track a sag, then a rise or "hog's back," and then a down grade. When about one-half of the train

Burns v. Chicago, Milwaukee & St. Paul Railway Company.

was on the "hog's back," it separated between the fifth and sixth cars from the rear. About the time the sag was reached the plaintiff's son and the rear brakeman were on top of the cars, the deceased being on the fifth car from the rear, and the other brakeman on the car next to the caboose. The evidence tended to show that the deceased set the brake on the car he was on just prior to the separation. His body was found shortly afterward on the track. He must have fallen from the car to the ground, and been run over by the rear portion of the train. Whether the fall was accidental and through carelessness on his part, or whether he jumped from the train there is no evidence tending to show, except that there were some marks or indications on the ground that he struck it first with his feet.

[Other points omitted.]

The defendant insists that there is no evidence of negligence on the part of the employees, and that the plaintiff failed to show that his son was not guilty of contributory negligence. The only evidence of negligence, as we have said, is that the forward brakeman failed to apply the brakes at the proper time. This must necessarily depend on the condition of the track, that is, the character and extent of the grade, and perhaps other matters should be considered. It must be confessed that there is little or no evidence except the fact that the pin broke and the train separated. Whether this alone is sufficient to authorize a recovery we do not determine, for the reason that on another trial the evidence may be materially different.

As to the other question, all that appears is that the deceased was an experienced brakeman, of good habits. It must be presumed that he was in his proper place, engaged in the performance of his duties; that he properly applied a brake on the fifth car, but at which end does not clearly appear, but it may be the jury was authorized to find that the brake was near the forward end of the car. The train separated between that car and the one preceding it, and in some manner unknown, the deceased fell from the train. When last seen alive, the deceased was in a proper manner performing his duties, and therefore was not negligent. In about one minute afterward he disappeared, and was probably then dead.

There are cases which hold, when the evidence wholly fails to show that the deceased was using due care, that there cannot be a recovery. *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507; *Riley*.

Burns v. Chicago, Milwaukee & St. Paul Railway Company.

v. *Railroad Co.*, 135 Mass. 292. It has been said that "when circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited." *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330; s. c., 26 Am. Rep. 550. This court however has held that the jury may infer due care under circumstances quite similar, if not in principle identical, with the case at bar. *Greenleaf v. Ill. Cent. R. Co.*, 29 Iowa, 14. See also *Allen v. Willard*, 57 Penn. St. 374 (380); *Gay v. Winter*, 34 Cal. 153; *Strong v. City of Steven's Point*, 62 Wis. 255. This last case is much like the case at bar.

We are not prepared to say that there was no evidence which authorized the court to submit the question of due care on the part of the deceased to the jury, who had the right to consider all the circumstances, including the known habits of the deceased, and the instincts of self-preservation with which all men are imbued. If the cause or manner of the death were wholly unknown, it may be that a different rule should prevail.

[On other grounds.]

Reversed.

NOTE BY THE REPORTER. — See *Cassiday v. Angell*, 12 R. I. 447; s. c., 84 Am. Rep. 790; *Dallas v. Wichita Ry. Co.*, 61 Tex. 427; s. c., 48 Am. Rep. 297; *Louisville, etc., R. Co. v. Goetz, Admr.*, 79 Ky. 442; s. c., 42 Am. Rep. 227; *Chase v. Mo. Cent. R. Co.*, 77 Mo. 62; s. c., 52 Am. Rep. 744. Also note, 28 Am. Rep. 563.

Mr. Thompson says (Neg. 1175): "It is held in several of the States that in order to make out a *prima facie* case the plaintiff must not only show negligence on the part of the defendant, but he must also show that he was in the exercise of due care in respect to the occurrence from which the injury arose. This is held in Massachusetts, Maine, Illinois, Iowa, Connecticut, Mississippi, Michigan and Indiana. In Pennsylvania, Missouri, Wisconsin, Kentucky, Maryland, Kansas, Alabama, Minnesota, New Jersey and California, it is held that the negligence of the plaintiff contributing to the injury complained of is a matter of defense, and that ordinarily the burden of proving it is on the defendant. In New York and several other States the decisions are irreconcilable." These other States, according to Mr. Thompson, are Vermont, Texas and Ohio. Mr. Thompson further says that in the first class of States it is held that proof of contributory neglect need not be direct but may be inferred, and in the second, if the plaintiff's case raises an inference of neglect on his part, he must show that he was not guilty of neglect. Mr. Thompson evidently leans in favor of the doctrine that the burden is on the defendant.

On the other hand Mr. Beach, the latest writer, leans heavily the other way. Cont. Neg. 425. He says "the decided weight of authority" is that other way, and that "this is the rule in Massachusetts, Maine, Mississippi, Louisiana, North Carolina, Michigan, Oregon, Illinois, Connecticut, Iowa and Indiana." He

Rogers v. Highland.

admits that "this rule has not in general found favor with the text-writers, and the theorists and critics," and that opposed to it are the decisions of "the Supreme Court of the United States, Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont and Colorado, as well as England." He also finds the decisions in New York conflicting, and he quotes our conclusion as to them, in the note, 89 Am. Rep. 518; but he finds that since that time the New York Court of Appeals "has taken somewhat advanced ground" in favor of putting the burden on the plaintiff, and considers that rule "as well settled as any rule of law is ever likely to be." We can hardly agree with Mr. Beach as to which side the weight of authority or of reason inclines.

ROGERS V. HIGHLAND.

(89 Iowa, 504.)

Mortgage — chattel — of unweaned colts.

A mortgage of a mare covers her colts subsequently foaled until they are weaned.

THE opinion states the case.

W. H. Stiles, for appellant.

Porter & Porter, for appellees.

BECK, J. I. The animals seized under the attachment were two sucking colts, two and three months old, respectively. The intervenor alleges in his petition that before the colts were foaled the defendant executed to him two chattel mortgages upon the dams of the colts, which had been duly recorded, and that the colts were sucklings, of the age of two and three months, respectively, when the attachment was levied upon them, and were, at the time of the levy, in the possession of defendant. The intervenor also alleges that before the levy he notified plaintiffs of his mortgages, and his rights thereunder. The mortgages gave the intervenor the right to take possession of the mortgaged property whenever he should choose to do so. The demurrer was sustained, on the ground that the mortgages did not attach to the increase or progeny of the mares.

II. In our opinion, the right of possession of the colts was vested by the mortgage in the intervenor, and this right continued cer-

 Johnson v. Miller.

tainly until the colts were weaned, or should be weaned, according to the course of nature or the usual custom of those who raise horses. The right of possession of the colts follows the dams, for the reason that the two cannot or ought not to be separated; and when a mare having a young colt is sold, the foal usually goes with her, unless, by express agreement, it is retained by the seller. The reason for this rule rests upon the necessity of permitting the foal to draw nurture from the dam until the weaning time. As between the mortgagor and mortgagee, this rule, we think, is not only supported by reason, but it has the sanction of authority. See the following cases: *Winter v. Landphere*, 42 Iowa, 471; *Funk v. Paul*, 64 Wis. 35; s. c., 54 Am. Rep. 576; *Hughes v. Graves*, 1 Litt. (Ky.) 317; *Evans v. Merriken*, 8 Gill & J. 39; *Forman v. Proctor*, 9 B. Mon. 124; *Fowler v. Merrill*, 11 How. 375 (396); *Kellogg v. Lovely*, 46 Mich., 131; s. c., 41 Am. Rep. 151; *Darling v. Wilson*, 60 N. H. 59; s. c., 49 Am. Rep. 305. The attaching creditor acquires through his attachment no higher or better right to the property seized than was held by the defendant when the attachment was levied, unless some fraud or collusion of the parties would change the rights of those concerned. *Thomas v. Hillhouse*, 17 Iowa, 67.

It follows from these views that the intervenor held, under his mortgages, the right of possession of the property. The demurrer to his petition was therefore erroneously sustained.

Reversed.

JOHNSON V. MILLER.

(50 Iowa, 502.)

Malicious prosecution — advice of counsel — statement of case.

In an action for malicious prosecution, the defendant may avail himself of the defense of the advice of counsel, although he did not submit to his counsel facts which he might have ascertained by reasonable diligence.

ACTION for malicious prosecution. The opinion states the case. The plaintiff had judgment below.

Horace Boies and Hubbard, Clark & Dawley, for appellants.

Charles E. Wheeler and W. A. Foster, for appellee.

REED, J. The plaintiff and all the defendants, except S. D. Potter, reside in Jones county. Potter is a resident of Greene county. In June, 1874, Potter purchased about fifty head of calves in Jones county, which he drove to his farm in Greene county. The defendant Foreman claimed that four of the number belonged to him, and that they had been stolen from him, and he instituted a suit for their recovery before a justice of the peace in Greene county, and on the trial he established his right to them. Potter claimed that he had purchased said calves from plaintiff, and an indictment was subsequently returned by the grand jury, in which he was accused of the larceny of the property; but upon the trial of the indictment he was acquitted. He then instituted this suit, alleging that the defendants had conspired together to institute said prosecution, and that it was commenced maliciously and without probable cause.

[Other matters omitted.]

One of the defenses relied on was, that in doing what they did about the institution of the prosecution, the defendants acted on the advice of the district attorney, to whom they had made a full and fair statement of the facts of the transaction as they had ascertained them, and of the evidence which could be produced to substantiate the charge against the plaintiff, and who had advised them that the facts and evidence afforded ground for the institution of the prosecution. The District Court gave the following instruction:

“(26) Whether or not the defendants, or some of them, did, before instituting the proceedings, make a full, fair and honest statement to the district attorney, of all the material facts bearing upon the guilt of plaintiff, of which they had knowledge, and which they could have ascertained by reasonable diligence, and whether in commencing such prosecution the defendants acted in good faith, upon the advice of said district attorney, are questions of fact to be determined by you from all of the evidence and circumstances in the case. If you believe from the evidence that none of the defendants made a full, fair and truthful statement of such facts to the district attorney, or that they instituted the criminal proceedings from a fixed determination of their own, rather than from the advice of said district attorney, the advice of the prosecuting attorney would not be a defense in this action.”

In our opinion this instruction is erroneous. One who seeks the advice of counsel with reference to the commencement of a criminal

prosecution is bound to act in good faith in the matter. Unless he does this he will not be protected from liability on the ground that he acted upon the advice given him. He is required to make to the counsel a full and fair statement of all the material facts known to him. If he has a reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts, and communicate the information obtained to the counsel, or that he shall inform him of his belief of their existence, in order that he may investigate with reference to them, and take into account, in forming his opinion, the information attained with reference to them. But he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. But if he honestly believes that he is in possession of all the material facts, and makes a full and fair statement of those facts to the counsel, and acts in good faith on the advice given him, he ought to be protected. This, it seems to us, should be the rule when the advice of private counsel is relied on. But there are more cogent reasons for applying it where the communication is made to the public prosecutor. In criminal cases, that officer is the representative of the State. He is required, not only to prosecute indictments which are found, but it is his duty to assist in the investigation of charges against individuals which are brought to the attention of the grand jury. He is by law made the legal adviser of the grand jury. When a complaint is made to him that a public offense has been committed, it is his duty to investigate the charge, and if he deems it a matter of sufficient importance to demand the attention of the grand jury, it is also his duty to have the witnesses subpoenaed and brought before that body; and he has the right to appear also and assist in their examination. Neither he nor the grand jury are confined in their investigations to the witnesses named by the complainant, but they have the power to send for and examine any witnesses who they have reason to believe can give any material evidence bearing on the question of the guilt of the accused. We shall not, of course, be understood as holding that a party who maliciously makes a groundless charge to the district attorney, and thereby procures the finding of an indictment, is not answerable to the one injured by the proceeding. It would however be a very harsh rule, and one calculated to discourage en-

State v. Donnelly.

tirely the making of complaints by private individuals, to hold that one who has acted on the advice of the district attorney, given upon a full and fair statement of all the material facts which he knew, or which he had reasonable ground to believe, existed at the time, was not protected by the advice of the attorney, simply because he did not before making the complaint learn of other material facts, of the existence of which he might have learned by reasonable inquiry. Yet that is the doctrine of the instruction. The instruction seems to have the support of Hilliard in his work on Torts (vol. 1, p. 506), and Wait in his work on Actions and Defenses (vol. 4, p. 335). The doctrine of the text is supported however by but few of the cases cited in the notes in support of it, and we do not believe it is sound.

The judgment of the District Court will be reversed, and the cause remanded.

Judgment accordingly.

STATE v. DONNELLY.

(99 Iowa, 705.)

Criminal law — homicide — duty to retreat.

Where one is feloniously and dangerously assailed, he is bound to retreat, if he can do so without danger.

CONVICTION of manslaughter. The opinion states the case.

Horace Boies and J. J. Ney, for appellant.

A. J. Baker, attorney-general, for the State.

ADAMS, C. J. I. The defendant shot his father, Patrick Donnelly, with a shot-gun, causing a wound of which he died about two days afterward. The deceased had become very angry with the defendant, and at time of the firing of the fatal shot was pursuing the defendant with a pitchfork, and the circumstances were such that we think that the jury might have believed that he intended to take the life of the defendant. On the other hand, the circumstances were such that we think that the jury might have believed that the defendant could have escaped, and fully protected himself by retreating, and that he had reasonable ground for so thinking.

The court gave an instruction in these words: " You are instructed that it is a general rule of the law, that where one is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch, before he is justified in repelling such assault in taking the life of his assailant. But cases frequently arise where the assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the party thus assaulted to retire without manifest danger to his life, or of great bodily injury; in such cases he is not required to retreat," The defendant assigns the giving of this instruction as error. He contends that the court misstated the law in holding, by implication, that he is excused from doing so only where it would manifestly be dangerous to attempt it. His position is that the assailed is under obligation to retreat only where the assault is not felonious, and that where it is felonious, as the evidence tends to show in this case, he may stand his ground, and kill his assailant, whatever his means of retreat and escape might be, provided only he had reasonable cause for believing that if he stood his ground, and did not kill his assailant, his assailant would kill him, or inflict a great bodily injury. Under this theory and the evidence, the jury might have found that the defendant was justified in killing his father, and that too even though there had been other evidence showing that his father was so old and decrepit that the defendant could have escaped him simply by walking away from him. It is perhaps not to be denied that the defendant's theory finds some support in text-books and decisions. But in our opinion it cannot be approved. This court has, to be sure, held that a person assailed in his own house is not bound to retreat, though by doing so he might manifestly secure his safety. *State v. Middleham*, 62 Iowa, 150. While there is some ground for contending that the rule does not fully accord with the sacredness which in later years is attached to human life, the course of decisions appeared to be such as not to justify a departure from it. The rule for which the defendant contends seems, so far as it finds support in the authorities, to be based upon the idea, that where a person attempts to commit a felony, it is justifiable to take the offender's life if that is the only way in which he can be prevented from consummating the felony attempted. But where a person is assailed by another who attempts to take his life, or inflict great bodily injury, and the assailed can manifestly secure safety by retreating, then it is not necessary to take the life

State v. Donnelly.

of the assailant to prevent the consummation of the felony attempted. In Roscoe Crim. Ev., 768, note, the annotator says: "When a man expects to be attacked, the right to defend himself does not arise until he has done every thing to avoid that necessity," citing *People v. Sullivan*, 7 N. Y. 396; *Mitchell v. State*, 22 Ga. 211; *Lyon v. State*, 22 Ga. 399; *Cotton v. State*, 31 Miss. 504; *People v. Hurley*, 8 Cal. 390; *State v. Thompson*, 9 Iowa, 188; *U. S. v. Mingo*, 2 Curt. 1. In our opinion, the court did not err in giving the instruction in question.

[Omitting minor questions.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

**AGNEW V. CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COM-
PANY.**

(24 S. C. 18.)

Mortgage—merger.

A debtor executed a mortgage as security for a liability incurred by his surety. Afterward, the surety having paid the debt, the debtor deeded the land to him, subject to the mortgage, and providing that it was "to remain open." *Held*, no merger.

ACTION to recover land. The opinion states the case. The defendant had judgment below.

E. C. Haynsworth, for appellant.

J. H. Rion, contra.

McGOWAN, J. This was an action to recover 210 acres of land under the following circumstances: On September 9, 1872, James M. Rutland and James H. Rion, as executors, conveyed to one G. P. Hoffman a tract of land containing 1,159 acres, which included the small tract in dispute. Hoffman gave his bond for the purchase-money, with the defendant corporation as surety, and on the same day executed to the said railroad company a mortgage of the

Agnew v. Charlotte, Columbia and Augusta Railroad Company.

premises, to indemnify them against loss as such surety. On May 11, 1882, the plaintiff, Agnew, recovered a judgment against the said Hoffman and issued execution thereon. On October 27, 1882, the railroad company, as surety, having been required to make payments on the purchase-money, settled with Hoffman, who assigned certain choses in action, paid a sum in lumber, and conveyed 560 acres of the land mortgaged to them, including the 210 acres now in dispute, toward payment of the mortgage debt.

This conveyance contained the following clause: "All of said tracts being portions of a tract of 1,159 acres purchased by me of James M. Rutland and James H. Rion, as executors, etc., on September 9, 1872, payment secured by my bond, with the aforesaid company as surety, and a contemporaneous mortgage of the premises for joint security of grantors and surety; this grant, bargain, sale, and release being made with the consent of James H. Rion as a conveyance of the said three tracts of land, the same having been paid for by said railroad company; and hence I do hereby grant, bargain, sell, and release the said land subject to a mortgage to said company, which is to remain open to protect against claim of dower, liens, and incumbrances, together," etc.

On March 3, 1884, the sheriff, under plaintiff's execution, sold the tract of 210 acres, and the plaintiff, becoming the purchaser, brought this action for the land. Trial by jury was waived, and Judge WALLACE dismissed the complaint. The plaintiff appeals to this court upon the following grounds: "1. Because his honor did not find, in his fifth finding of fact, that on October 27, 1882, the said G. P. Hoffman and the defendant herein came to a settlement, in which said G. P. Hoffman assigned some choses in action and paid the defendant \$205 in lumber, and conveyed to the defendant, in settlement of the balance due by him, 568 9-10 acres, it being a part of the original tract, and consisting of three tracts, of which the tract of 210 acres mentioned in the complaint is one. 2. Because his honor held that there being an express stipulation in the deed of conveyance that said mortgage should remain open, the conveyance from Hoffman to the defendant did not operate to merge or satisfy said mortgage as to the land conveyed to the defendant. 3. Because his honor did not hold that said mortgage was merged or satisfied by such conveyance, and that the plaintiff is entitled to the possession of said tract of land. 4. Because his honor did not hold that even if said mortgage was not merged or

Agnew v. Charlotte, Columbia and Augusta Railroad Company.

satisfied, the plaintiff is entitled to recover the possession thereof, subject to the lien of said mortgage," etc.

It is true that under our law a mortgage of real estate is merely a security for the debt, the legal title remaining in the mortgagor. The conveyance of the land by Hoffman to the railroad company was subsequent to the recovery of Agnew's judgment against Hoffman, and therefore that conveyance alone could not stand in the way of title acquired under Agnew's judgment. The answer to this however is, that there was a lien upon the land when Agnew's judgment was recovered, viz., the mortgage of the railroad company, and that the land was conveyed to the company in payment of the debt secured by that senior lien. But to this it is replied that the conveyance of Hoffman, the mortgagor, to the company, the mortgagee, operated, by way of merger, to extinguish not only the whole mortgage debt, but the mortgage itself, leaving the land subject to the next lien, precisely as if the mortgage had never existed; so that the question is whether the court must apply technical legal doctrine of merger, and thereby declare the mortgage extinguished, notwithstanding the stipulation of the parties, expressed in the conveyance itself, that the mortgage should "remain open" to protect the purchaser, who had paid the debt, against liens subsequent to the mortgage, but prior to the conveyance of Hoffman to the railroad company.

In this State the legal merger has been applied to the case of a mortgagee purchasing from the mortgagor, or under legal process against him, the interest known as the equity of redemption. See *Devereux v. Taft*, 20 S. C. 558. The general doctrine, as stated by Chancellor WARDLAW in the case of *Allen v. Richardson*, 9 Rich. Eq. 53 is that a mortgagee, who buys the estate under mortgage, not under process of foreclosure of his lien, extinguishes the debt or claim with lien on the land," etc. It will be observed that the rule as here announced excludes from its operation a case, where the mortgaged premises are sold to pay the mortgage debt, under process of foreclosure. In such case the mortgagee may purchase and take good title. So far as title to the premises is concerned, it is somewhat difficult to draw a distinction in principle between a sale for the purpose of paying the mortgage debt under proceedings of foreclosure and one for the same purpose by the mortgagor himself. It is at least intelligible how such a purchase might be held as an extinguishment of any portion of the mortgage debt which the

Agnew v. Charlotte, Columbia and Augusta Railroad Company.

conveyance of the land failed to pay. But it is not equally clear why a private sale for the same purpose should be considered as placing the matter in the same condition as if neither the mortgage debt nor the mortgage had ever existed. It would seem that a conveyance in part payment of the debt secured should at least carry good title to the extent of the payment made upon the debt. Such is undoubtedly the result when the sale is made under proceedings to foreclose the lien.

But assuming the rule to be as stated, none of the cases in our books deal with any of the exceptions and qualifications of the general rule; as for instance, the case of an express written agreement by the parties that there should be no merger, but that the mortgage shall remain open for the protection of the purchaser. Although this precise point has never before arisen in this State, it seems that the general law upon the subject is well settled. Mr. Pomeroy states the doctrine as follows: "When the owner of the fee becomes absolutely entitled in his own right to a charge or incumbrance upon the same land, with no intervening interest or lien, the charge will at law merge in the ownership and cease to exist. Under like circumstances a merger will take place in equity, where no intention to prevent it has been expressed, and none is implied from the circumstances and interests of the party. Generally the same results follow, whether a mortgagee assigns a mortgage to the mortgagor or the mortgagor conveys the land to the mortgagee." 2 Pom. Eq. Jur., § 790. And in the section following he further says: "If there is no reason for keeping it (the mortgage) alive, then equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. In short, where the legal ownership of the land and the absolute ownership of the incumbrance become vested in the same person, the intention governs the merger in equity. If the intention has been expressed, it controls," etc. 2 Pom. Eq. Jur., § 791, and authorities in note; Jones Mort., § 848; *Insurance Company v. Murphy*, 111 U. S. 744.

We agree with the Circuit judge, that in this case the express agreement of the parties prevented a technical merger, and the senior mortgage of the company is still open. The plaintiff, Agnew, only purchased the equity of redemption, and he is not entitled to recover possession of the land in this action. Possibly he may,

State v. Moore

upon tender of the mortgage debt, have his action to redeem, but upon that subject we rule nothing in advance.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

SIMPSON, C. J., concurred; McIVER, J., dissented.

STATE V. MOORE.

(24 S. C. 150.)

Criminal law — indictment — caption — amendment.

An indictment, headed with the name of the State and county, alleged the same county as the county where the court was holden, and then alleged that "the jurors of and for the county of aforesaid," did present, etc. *Held*, (1) that the omission might be supplied; (2) that it was not material.

CONVICTION of arson. The opinion states the case.

E. G. Graydon, for appellant.

M. L. Bonham, Jr., and *W. C. McGowan*, contra.

SIMPSON, C. J. The defendant was tried for arson at the September extra term of the Court of General Sessions for Abbeville county. He was found guilty, with a recommendation to mercy, and was sentenced to the penitentiary for the term of ten years. Before sentence, his counsel moved in arrest of judgment on account of alleged defects in the indictment, and also for a new trial, both of which motions were overruled. These motions are renewed here by way of appeal.

The indictment was as follows:

"THE STATE OF SOUTH CAROLINA.— Abbeville County.

"At a Court of General Sessions, begun and holden in and for the county of Abbeville, in the State of South Carolina, at Abbeville court-house, in the county and State aforesaid, on Monday, the second day of February, in the year of our Lord one thousand eight hundred and eighty-five, the jurors of and for the county of ——— aforesaid, in the State of South Carolina aforesaid, that

is to say, upon their oaths, present that John Moore, on the fourteenth day of November, in the year of our Lord one thousand eight hundred eighty-four, with force and arms, in the county of Abbeville and State aforesaid, did willfully and maliciously set fire to and burn the gin-house of Francis Arnold, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State aforesaid."

On the motion in arrest of judgment below, it was urged that the indictment was fatally defective, because: 1st. That no county was mentioned in the indictment as the county of the jurors, the word "Abbeville" being left out, as above. 2d. That it was not alleged that the offense was committed at Abbeville court-house. 3d. That it was not alleged that the offense was committed "feloniously," the word "felonious" having been omitted. 4th. That it was not alleged that the gin-house was within two hundred yards of the dwelling-house. 5th. It was not alleged to be "appurtenant" to the dwelling. 6th. That it was not alleged to be within the curtilage. 7th. No allegation that it was an out-house of the prosecutor. 8th. That it was not alleged to be a parcel of the dwelling, "the proof offered having shown that the said gin-house was within two hundred yards of, and appurtenant to, the said dwelling-house."

An indictment consists of three prominent features, (1) the caption, (2) the charge, and (3) the conclusion. The caption is the heading to the indictment, and is not strictly a part of it. *State v. Williams*, 2 McCord, 301; *Vandyke v. Dare*, 1 Bail. 65. Only in that sense the expression above, that it is one of its features, is used. It has been defined to be that part of the record in a criminal case which comprehends the judicial history of the cause to the time of the finding of the indictment. Bish. Cr. Proc., ch. XI. § 147. It is an entry record, showing when and where the court is held, etc.

There has been some contrariety of opinion as to where the caption ends and the indictment begins, and especially whether the words, "The jurors, etc., on their oaths, present," constitute a part of the caption or a part of the indictment. In England, and in many of the States following the English practice, these words are termed the "commencement" of the indictment, and not considered to be a part of the caption. But in our State it has been distinctly held that they are part of the caption; that it is mere

State v. Moore.

introductory matter, and constitutes no portion of the indictment. In the case of *State v. Creight*, 1 Brev. 169; s. c., 2 Am. Dec. 656; TREZEVANT, J., said the caption ends with the words, "upon their oaths, present," and GRIMKE, J., said (p. 170): "It was resolved, in an earlier unreported case (*State v. Johnston*), that the part of the indictment here in question was a part of the caption."

Now the caption being no part of the indictment (*State v. Williams, supra*), and the omitted word here, "Abbeville," being a part of the caption (*State v. Creight, supra*), it follows that the law in reference to defects in the caption, and not the rule in reference to the charging part or the conclusion, should govern where objection is made on account of alleged defects. And it must be remembered that the rules in such cases are quite different. In reference to the charging part, the law is extremely strict, requiring the closest observance to established forms and precedents, and demanding a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. Manner, time and place must be alleged, and even particular words and phrases sometimes, though they may seem technical, must be used.

This strictness is however not required in reference to the caption, the distinction in the two cases being that the charging part is really the matter which the accused is called upon to meet and answer, while the caption is a mere history or record of the case, up to the finding of the indictment, containing the name of the court, county and State, and where and by whom the indictment has been found. It is important for the accused to be informed fully as to the crime with which he is charged, so that he can prepare for his defense; so that he can be shielded against a second trial for the same offense; and it is important, too, to the court that the crime charged should be set out with great particularity, so that in looking at the record, it may decide whether the facts charged constitute an offense within its jurisdiction, whether a conviction will warrant punishment, and what the punishment shall be. These reasons however do not apply to the caption, and accordingly as we have said, the rule as to the caption is much more liberal than as to the charging part of the indictment. It was held in the case of *State v. Creight, supra*, that the caption may be made up or amended at any time, etc. The opinion in that case was based upon the case of *State v. Johnston, supra*, in which a motion was made in arrest of judgment on

several grounds, one of which was that the caption did not mention either the day or the year when the court was held, at which the bill was found. The court unanimously overruled the motion.

In the case of *State v. Williams, supra*, a similar motion was made on the ground that it was not set out in the caption, that it was a "special court." The court said: "The caption must set forth with sufficient certainty the court in which, the jurors by whom, and also the time and place at which, the indictment was found, so that it might appear on the face of the indictment that the court had jurisdiction of the offense, that the jurors were sworn, and that the court was holden at the proper time." But in regard to the omission complained of, it said further: "There is no doubt however about the right to amend the caption of an indictment at any time, and leave is therefore granted to amend." And in *Vandyke v. Dare, supra*, the court held and said: "The caption is no part of the indictment, etc., setting out the style of the court, the time at which, the names of the jurors, etc., may be amended at any time by the journals of the court"—further saying: "It has become so much a matter of course, that it is usually left in blank until some occasion occurs which renders its perfection necessary, and then leave is obtained for filling it up as a matter of course." These cases have been referred to to show that even if the word "Abbeville," which is omitted here, ought to have been inserted, yet that the defect is not fatal; it may be inserted afterward.

But is the omission of this word a legal defect? We think not; because though the word itself does not appear, yet in substance and proper intendment it is there. As we have seen, the caption of an indictment in this State does not end until it reaches the words, "upon their oaths do present." Down to that point, all the preceding part constitutes the caption. When the county of Abbeville then is used in the preceding part, and when immediately following comes "the jurors of and for the county of ——— aforesaid," is not that in substance saying the county of Abbeville? 1 Saund. 308, note 1, cited in *State v. Lamon*, 3 Hawk. 178. And would it not be a subtle distinction indeed to hold otherwise? See the case of *State v. Coleman*, 8 S. C. 243, a case of murder, and where the defect complained of was in the body of the indictment, the charging part, and yet it was not held fatal. See *Reeves v. State*, 20 Ala. 33.

[Minor points omitted.]

Judgment affirmed.

 State v. Belton.

STATE V. BELTON.

(24 S. C. 185.)

Witness — understanding of oath.

A boy of twelve years who habitually repeated the Lord's prayer, and had heard that the bad man caught those who lied, cursed, etc., but had never heard of a God, or the devil, or of heaven or hell, or of the Bible, and had never heard and had no idea what became of the good or of the bad after death, is not a competent witness.*

CONVICTION of murder. The opinion states the case.

W. D. Trantham, for appellant.

J. D. Kennedy, contra.

SIMPSON, C. J. The defendant, David Belton, was convicted of the murder of Aaron Dean at the September term, 1885, of the Court of General Sessions for Kershaw county, his honor, Judge Hudson, presiding. From the judgment he has appealed upon four exceptions, raising questions as to the competency and admissibility of certain testimony introduced by the prosecution. The first is as to the competency of a witness, Jim Miller. This witness was a boy about twelve years of age. He seems to have been a boy of at least ordinary intelligence, and although he had learned from his mother, since dead, the Lord's prayer when he was five years old, and according to his statement had repeated it every day since, yet he said he had never heard of a God or the devil, or of heaven or hell, or of the Bible, and that "he had never heard and had no idea what became of the good or of the bad after death." He said however that he had heard it said that the bad man caught those who lied, cursed, etc., and upon being examined he repeated the Lord's prayer. The presiding judge, in his report of the case as to this matter, states as follows: "As for the colored youth, he manifested an unusual sense of the efficacy of prayer, and the future torments by the bad man awaiting those who speak falsely, though his answers as to a God, heaven, etc., were singular. The

* See *Carter v. State* (63 Ala. 52), 35 Am. Rep. 4.

court gave him instructions as to the meaning and obligations of an oath and then permitted him to be sworn." His admission is assigned as error in the first exception.

[Minor exceptions omitted.]

Now let us recur to the first exception. A leading case upon the question of law raised therein in England is the case of *Omichund v. Barker*, reported in 1 Wille, 538, and more fully in 1 Atk. 21, and found in 1 Smith Lead. Cas. 195. In this case, upon a full and most interesting discussion of the whole question of the competency of a witness as affected by his religious creed, it was made to rest upon the question of his belief in the existence of a God, and rewards and punishments by Him, either in this world or in the future state, "the court stating that one who believes in a future state, and that he shall be punished in the next world as well as in this if he does not swear the truth, should be entitled to the greater credit, as he is plainly under the strongest obligation." In most of the States of the Union, it has been held that the competency of a witness is not affected by a disbelief in a future state, and that his testimony should be admitted if he believes in the existence of a God and in Divine punishment of crime. See *Hunscom v. Hunscom*, 15 Mass. 184; *Brock v. Milligan*, 10 Ohio, 121; *Blocker v. Burness*, 2 Ala. 354; *United States v. Kennedy*, 3 McLean, 175; *Bennett v. State*, 1 Swan. 411. In our own State, the case of *Jones v. Harris*, 1 Strob. 160, lays down very much the same doctrine, holding that a belief in God and His providence is sufficient to establish the competency of a witness, objected to on account of defective religious beliefs.

Now let the competency of the witness, James Miller, be tested by the rule of *Jones v. Harris*, *supra*, which is the law of South Carolina on this subject. Did he believe in a God and His providence? He stated to the court that he had never heard of a God, or of a heaven, or of a hell, or of a devil. How then could he have a belief in the existence and providence of a Great Being, of whom, up to the time that he was offered as a witness, he had never heard even? Such a belief, under such circumstances, seems impossible. In the absence of such belief, he was incompetent under the authorities cited. The fact that he had learned the Lord's prayer, had repeated it daily for years, repeated it in court, and stated that he had heard it said that the bad man caught those who lied and cursed, etc., did not furnish, as it seems to us, suffi-

Watson v. Watson.

cient proof of a belief on his part of the existence and providence of a Being of whom, up to that moment, he had never heard.

Judgment reversed and cause remanded.

McIVER, J., concurred.

McGOWAN, J., dissenting. I incline to think that the colored lad, Jim Miller, was a competent witness under the ruling in *Jones v. Harris*. He was not educated in book, but he had at least ordinary intelligence, and was twelve years of age. Although he said he had never heard of "God," yet he could repeat the Lord's prayer, and had "a strong sense of the future torments of the bad man, awaiting them who speak falsely." Was not this really a belief in Providence and rewards and punishments? The tendency in these latter days is "to enlarge the circle of competency by directing objections to the credibility of witnesses."

WATSON V. WATSON.

(24 S. C. 222.)

Covenant—to stand seised to uses.

A husband executed to his wife an instrument in form of a warranty deed, to take effect at his death, and also conditioned "not to be in full force until I desire to act." Held, valid as a covenant to stand seised to uses.

ACTION to recover land. The opinion states the case. The defendant had judgment below.

B. L. Abney and E. A. Glover, for appellants.

M. C. Butler and B. W. Bettis, contra.

SIMPSON, C. J. Tillman Watson, Sr., late of Edgefield county, died intestate February, 1874. He died childless, but he left surviving him his widow, the defendant, and several collateral kindred, among whom are the plaintiffs. The widow administered and all of the real estate admitted to belong to the deceased has been partitioned among the parties entitled. The widow however is in the possession of the homestead, containing some four hundred acres, which she claims under a deed executed by her husband in

July, 1870, and which therefore was not embraced in the partition. The plaintiffs deny the validity of this deed as a conveyance of this property, and the action below was brought to recover one undivided half of the same. The defendant, in addition to relying on the deed, plead lapse of time and the statute of limitations. The action below was commenced in January, 1884.

The cause was heard by consent by his honor, Judge WITHERSPOON, upon testimony taken before the clerk of the court. His honor found as matter of fact that the deed in question had been executed and delivered, and as matter of law that it was a covenant to stand seised to uses. He therefore adjudged that the defendant was entitled to the land, whereupon he ordered the complaint to be dismissed with costs.

The appeal denies the execution and delivery of the deed; also that it could be construed as a covenant to stand seised; and also that defendant was entitled to hold the land under said deed. It also assigns error to the Circuit judge in admitting certain testimony as to the acts, declarations and intention of Tillman Watson concerning said deed. The following is a copy of the deed in question:

“STATE OF SOUTH CAROLINA — Edgefield County.

“Know all men by these presents that I, Tillman Watson, Sr., of Edgefield county, in the State aforesaid, in consideration of the affection I bear my wife, Elizabeth C. Watson, at and before the sealing of these presents, have granted, bargained, and at my death by these presents do grant, bargain, and release unto the said Elizabeth C. Watson all that tract or parcel of land known as my homestead, containing four hundred acres, more or less, situate, lying, and being in the county of Edgefield and State aforesaid, near Ridge Spring depot, on the Charlotte, Columbia and Augusta railroad, being bounded as follows, viz.: On the north, by lands of P. J. Quattlebaum; on the east and south, by lands of Burrell Boatwright; and on the west, by the Charlotte, Columbia and Augusta railroad and land of Mrs. T. Watson; together with all the kitchen and household furniture and effects, with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining. To have and to hold all and singular the premises before mentioned unto the said Elizabeth C. Watson, her heirs and assigns, forever. All of the before

Watson v. Watson.

mentioned property I give to my wife, Elizabeth C. Watson, independent of her dower, and no enumeration or deduction is to be made against her in consideration thereof in the final distribution of my estate; and I do bind myself, heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said Elizabeth C. Watson, her heirs and assigns, against my heirs and all and every other person lawfully claiming or to claim the same or any part thereof.

"Witness my hand and seal this thirteenth day of July, in the year of our Lord one thousand eight hundred and seventy, and in the ninety-fifth year of American independence. This paper to be in full force until I desire to act.

"TILLMAN WATSON, Sr. [L. &.]

"Signed, sealed, and delivered in the presence of

"P. J. QUATTLEBAUM,

"R. P. JONES.

"STATE OF SOUTH CAROLINA — Edgefield County.

"Personally appeared before me P. J. Quattlebaum, and made oath that he saw the within named Tillman Watson, Sr., sign, seal, and, as his act and deed, deliver the within deed, and that he, with R. P. Jones, witnessed the execution thereof.

"R. P. QUATTLEBAUM.

"Sworn to before me this 9th day of August, 1873.

"JACKSON COVAR, N. P.

"Recorded on the 15th day of December, 1875.

"JESSE JONES, C. C. C. P."

The questions involved in this appeal were very fully and elaborately discussed before us on both sides, and especially was much light thrown upon the intricate subject of conveyances, both at common law and under the statute of uses, many authorities having been cited and ably commented upon. The case however involves an examination of only one of the classes of conveyances discussed, to-wit: covenants to stand seised, which originally only created a trust enforceable in equity, but afterward by the statute of uses conveyed the legal title, and therefore since the statute recognized at law. The Circuit judge held the deed in question here a covenant to stand seised, and whether he erred in thus holding is the main question to be considered. What is a covenant to stand seised, and what are its prominent features and characteristics?

Mr. Kent describes it as well and perhaps better than can be found elsewhere. No apology is therefore necessary for quoting from him, even at some length. He says: "By this conveyance a person seised of lands covenants that he will stand seised of them to the use of another. On executing the covenant the other party becomes seised of the use of the land, according to the term of the use, and the statute of uses immediately operates and annexes the possession to the use. This conveyance has the same force and effect as a common deed of bargain and sale, but the great distinction between them is that the former can only be made use of among domestic relations, for it must be founded on the consideration of blood or marriage. No use can be founded for any purpose by this conveyance in favor of a person not within the influence of the domestic consideration; and it makes no difference whether the grantee, if he be a stranger to the consideration, is to take on his own account or as a mere trustee for some of the family connections. He is equally incompetent to take. The existence of another consideration in addition to that of blood or marriage will not impede the operation of the deed. Covenants to stand seised are a species of conveyance said no longer to be in use in England, as no use would vest in a stranger to whom the consideration of blood did not extend. They owe their efficacy to the statute of uses. * * * But if the covenant to stand seised be founded on the requisite consideration, it would be good as a grant, for there would be no dispute about the intention, and it is admitted that in a covenant to stand seised any words will do that sufficiently indicate the intention. It is a principle of law that if the form of the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character so as to give it effect.

* * * The qualification to this rule is, that the instrument must partake of the essential qualities of the deed assumed; and therefore no instrument can operate as a feoffment without livery, * * * nor as a grant, unless the subject lies in grant; nor as a covenant to stand seised without the consideration of blood or marriage; nor as a bargain and sale without a valuable consideration. If there be no lease to make a deed good as a release, and no livery to make it good as a feoffment, it may operate as a bargain and sale; or if a release cannot operate because it attempts to convey a freehold *in futuro*, it will be available as a covenant to stand

Watson v. Watson.

seised provided there be the requisite consideration." 4 Kent, 493-5.

It appears from this that the principal characteristics of a covenant to stand seised are, first, the intention; secondly, it must be founded upon the consideration of blood or marriage, and it may create a freehold *in futuro*; and further though the form of the deed according to its letter may not be a covenant to stand seised, yet if such be the intention it will be so construed provided the consideration be that of blood or marriage. See also our cases of *Chancellor v. Windham*, 1 Rich. 164; s. c., 42 Am. Dec. 411; and *Kinsler v. Clark*, 1 Rich. 170, especially on the point of creating a freehold *in futuro* by covenants to stand seised. Now let the deed in question be tested by the principles laid down in the authorities cited. The consideration is of the character required in a covenant to stand seised, and there can be no doubt that Mr. Watson intended to create an estate in fee in his wife to take effect in enjoyment at his death, reserving a life estate to himself, thus creating a freehold as to enjoyment *in futuro*, one of the leading features of a covenant to stand seised.

The case of *Chancellor v. Windham*, *supra*, was very similar to the case here. In that case one John Wilson, by words *in presenti*, had given, granted and released unto his son, his heirs and assigns, the land described in the deed, at his death to have and to hold, etc. It was held to be a covenant to stand seised, though creating a freehold *in futuro*. And so too in the case of *Kinsler v. Clark*, *supra*, where a mother, in consideration of natural love and affection, etc., gave and granted to her two sons after the term of her natural life a tract of land, the same holding was had. In the former case Judge WARDLAW said the authorities cited "show that a deed, whether in form a feoffment, a bargain and sale, or a lease and release, if the consideration of blood or marriage exists, may, to effect the intention of the parties, be construed to be a covenant to stand seised; that give and grant are apt words for such covenant, and that it is the duty of courts by reasonable construction to give effect to the intention of parties not inconsistent with law. The deed in question is therefore a good covenant to stand seised to uses."

Here apt words are used, the intention is apparent, and the exact consideration required is present; why therefore should we not sustain the Circuit judge in his holding this paper a covenant to stand seised? It is urged that this should not be done, first, because

in this deed personal property is embraced (household and kitchen furniture), which could not be made the subject of a covenant to stand seised; and second, that the grantor reserved a power of revocation by the last words of the deed, "This paper to be in full force until I desire to act;" and it is contended that these two facts differentiate this case from the cases relied on above. It is true that the statute of uses does not apply to personalty, and it is also true that at common law, while a conveyance of a chattel might be made to commence *in futuro* at a definite time fixed, yet it could not be made after a life estate, because a life estate was supposed to be of longer duration than any chattel. This ancient common law rule however has been much modified since, and it cannot be said now that it has been established as an inflexible rule to be applied in all cases of personalty without regard to the circumstances. Be this as it may however, we do not understand that the personalty here is really in contest. Whether it has been destroyed or whether it is in the possession of the defendant, does not appear.

The fact though, that it appears in the deed as a portion of the property attempted to be conveyed, is made use of as an argument to show that the whole paper was ambulatory in its character, certainly so, as is contended, with reference to the personalty, because a future interest could not be created therein except by will, and inferentially so as to the land, because it is embraced in the same paper with the personalty. The land was far the most important and valuable portion of the conveyance. It was the homestead of these two old people, containing some 400 acres. If the small personalty found in the deed had not been embraced, we think there could be but little doubt as to the intention of the husband, and under the authorities cited above it would have been the duty of the court to declare the deed a covenant to stand seised, thereby creating a freehold *in futuro* in his widow. Such being the fact, is it not much more reasonable to suppose that the small personalty embraced was thrown in, either under the supposition that it will go with the land or perhaps inadvertently rather than to show that the deed was ambulatory, in the nature of a will, and was to have no effect except as a will? In these matters it must be observed that the intention must always control, and the intention must depend not upon the effect of portions of the paper taken up in detached parts, but upon the whole paper construed as a whole.

Johnson v. Pelot.

But it is urged that the last line of a deed *supra* affords evidence that the deed was not regarded or intended by old Mr. Watson to be irrevocable. Without going into the question of powers reserved in such cases, it seems sufficient here to say that the line in question is too indefinite and vague to predicate any construction thereof. In the first place, it is not agreed as to the last word in the line, whether it is "act" or "alt." This is the most important word in the line, and in the absence of a distinct understanding of what it is, it cannot be safely interpreted. All of the foregoing portions of the deed are reasonably clear and free from doubt, and directly opposed to the effect contended for from this line. To overthrow the clear portions of the deed by a portion which is not distinctly intelligible seems unreasonable. Besides the only intelligible portion of the line shows that Mr. Watson knew that he had made a deed, which was of force at the time at least and that it passed a right *in presenti*.

[Minor matters omitted.]

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

JOHNSON V. PELOT.

(24 S. C. 254.)

Tenants in common — improvements.

A tenant in common making improvements in the belief that he is sole owner may not be charged with the rent of them and may be reimbursed for them in partition.

PARTITION. The opinion states the case.

Lyles & Haynesworth, for plaintiff.

S. W. Melton, contra.

SIMPSON, C. J. The purpose of the action below was to partition certain real estate situate in the city of Columbia, and in possession of defendant, in which plaintiff claimed a moiety. The plaintiff's title being disputed, this question was submitted to a jury, who found for the plaintiff one-half of the land. Thereupon the Circuit judge, Hon. W. H. WALLACE, after stating certain facts found

by himself, ordered a writ in partition, awarding one-half in fee to the plaintiff and the remaining half in fee to the defendant. "At the same time he referred the case to the master to state the account of the defendant, Octavia Pelot, for the receipts of rents and profits of said lot of land for a period commencing six years prior to the commencement of this suit and extending up to the date of his report, together with all improvements thereon."

The commissioners in charge of the writ made their return in January, 1885, in which they stated that they had divided the land into two equal portions as to area, each fronting on Gervais street, and had allotted to the defendant the western half, and to the plaintiff the eastern. On the western half was a dwelling or store, which had been erected thereon by the defendant during her possession, and a kitchen which was there when she took possession. The dwelling or store they valued at \$300, the kitchen at \$100. On the eastern half was a store or workshop erected by the defendant; this they valued at \$150.

The master made his report, valuing the dwelling at \$400, the kitchen at \$100, and the work-house or store at \$200. He also reported upon the rents and profits received by the defendant for six years, amounting to \$313 — \$183.75 of which was derived from the kitchen, the balance from the other houses, principally the work-shop; upon which aggregate, after crediting taxes, \$166.50, a balance was left of \$146.50. The master made no recommendation, but simply reported the facts. He also reported the rental value of these houses. To this report the plaintiff excepted: 1. Because the master did not adopt the valuation fixed by the commissioners in partition, as the true value of the improvements. 2. Because the master did not find that the defendant had occupied the dwelling from December 15, 1877, and did not charge her with the rental value thereof.

The case then came up before his honor, Judge KERSHAW, who overruled the exceptions and confirmed the report, and holding that the case had been referred to the master for no other purpose but to collect the facts in reference to receipt of rents and profits by the defendant and the value of the improvements, so that the rights of the parties might be properly adjudicated, proceeded to such adjudication, holding that the defendant was not accountable for either the value of the improvements made by herself or the rents received from such improvements, but that she

Johnson v. Pelot.

was accountable for the rent received from the kitchen, such accounting however not to extend beyond the time of demand by the plaintiff to be admitted to her share of the common estate; and adopting the value of the improvements as estimated by the master instead of the commissioners, he held that the defendant was responsible to the plaintiff for half of the kitchen, \$50, and that plaintiff was responsible for the whole value of the store or workshop on her lot, it having been erected thereon by the defendant, to-wit, \$200; resulting to the defendant from plaintiff \$150 out of the improvements, the defendant to account for one-half of the rents received from the kitchen from the commencement of the action, first deducting therefrom one-half taxes paid on said kitchen from same date. He ordered and adjudged, that it be referred to the master to adjust the accounts between the parties according to the principles set forth, and that in all other respects the report of the master under consideration be confirmed and the exceptions thereto be overruled, each party to pay one-half of the costs.

Both parties appealed, the plaintiff alleging: I. That his honor should have held the decree of Judge WALLACE as fixing the liability of defendant for rents and profits for a period of six years before the action, and that he should therefore have decreed such liability as to the kitchen. II. That he should have held defendant to accountability for the ground rent of that portion of the premises improved by the defendant. III. Because he erred in holding the plaintiff accountable for the value of the store or shop erected by the defendant upon that portion of the lot assigned to the plaintiff. IV. Because the costs had been fixed in the decree of Judge WALLACE upon the defendant, and Judge KERSHAW should have so held. The defendant's appeal raises but one question, to-wit, that his honor erred in decreeing that the defendant should pay to the plaintiff the half value of the kitchen as ascertained by the master. [Omitting the first question.]

As already stated, we do not understand that plaintiff contends that the decree of Judge WALLACE fixed any liability on the defendant for rents and profits received from improvements erected by her on the lot, but she contends that the accountability of defendant as to the rent of the kitchen was fixed, and this for six years, and she now raises the question that whether this was fixed or not, yet that his honor erred in not requiring the defendant

thus to account, and also in not requiring an accounting for the ground rent of so much of the lot upon which the new building stood, this much at least being, as alleged, common property, made use of by the defendant. It appears among the findings of fact by the master that the defendant went into possession of the lot in question upon the death of her grandmother, Suckey McGru, "under the belief that she was the sole owner," and she no doubt so held it until the demand by action was made upon her, erecting improvements thereon without question. Under these circumstances, the law permits her to be exempt from liability for the rents and profits anterior to a demand by action. See the case of *Woodward v. Clarke*, 4 Strob. Eq. 170, and especially our recent case of *Scaife v. Thomson*, 15 S. C. 368; Freeman Co-ten., § 258, and *Riddlehoover v. Kinard*, 1 Hill Ch. 381. We do not find that his honor, the Circuit judge, erred in applying the principle of these cases to the facts here.

As to the ground rent of the precise *locus* upon which the improvements were erected, or of the unimproved portion, the master does not seem to have estimated this, nor did the Circuit judge rule upon that point. There was no exception to the master's report involving this point, nor any claim made for it before the Circuit judge; but even if this question was properly before us, we have been referred to no case, nor have we found any, where in estimating rents and profits against a co-tenant for improvements, a distinction has been drawn between said improvements and the ground upon which they stood, the improving tenant being exempt for the one and held liable for the other. It is manifest here that the unimproved ground was worthless except for the improvements, and also that that portion on which the improvements were erected was made rentable only on account of the improvements, so that its rentable value, if any, was due to the improvements, and might well be classed as an improvement made by the tenant's own labor, and therefore exempt, as the houses have been exempt. *Lewis v. Price*, 3 Rich. Eq. 198.

The equity of the defendant in this case to be reimbursed for her improvements on the portion of the lot assigned to the plaintiff is supported by the following authorities: *Scaife v. Thomson*, *supra*; *Woodward v. Clarke*, 4 Strob. Eq. 167; *Rowland v. Bess*, 2 McCord Ch. 317. Judge KERSHAW says that the commissioners seem to have considered the parcels of land allotted to each of the

Johnson v. Pelot.

parties to be of equal value without the improvements. These improvements then were left open as a matter for adjudication in the final determination of the rights and equities of the parties, and we do not think that Judge KERSHAW erred in requiring the plaintiff to account for the value of the store or shop erected on her lot at the expense of the defendant under the circumstances of the case.

There is no ground for defendant's exception claiming exemption from the half value of the old kitchen, as decreed by the judge.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

ON PETITION FOR A REHEARING.

SIMPSON, C. J. As a general rule, and in ordinary cases, where co-tenants are well known and easy of access, and improvements are made by one without consultation with the others, they are made at the risk of the improving tenant, and will not, as matter of right, be allowed him in the partition of the premises. 1 Story Eq. Jur., § 655; *Thurston v. Dickinson*, 2 Rich. Eq. 317; s. c., 46 Am. Dec. 56; *Dellet v. Whitner*, Chev. Eq. 223; *Hancock v. Day*, McMull. Eq. 69; s. c., 36 Am. Dec. 293; *Thompson v. Bostick*, McMull. Eq. 79. Where however improvements are made by one co-tenant under the belief that he has in severalty a fee-simple title to the premises, or where said improvements have been erected under circumstances which would make it a great and obvious hardship upon the improving tenant to deprive him entirely of their benefit, the disposition of the court of equity has always been to give him the benefit thereof if practicable, and as far as consistent with the equity of the co-tenants, especially as against the claim of one who subsequently thereto establishes his right as co-tenant. 1 Story Eq., § 655.

Under this principle, the cases of *Williman v. Holmes*, 4 Rich. Eq. 476; *Scrife v. Thomson*, 15 S. C. 368; *Annely v. DeSaussure*, 17 S. C. 391; *Johnson v. Harrelson*, 18 S. C. 604; *Buck v. Martin*, 21 S. C. 592, were decided, modifying the general rule above by allowing the improving tenant not the original cost of his improvements, but the increased value of the premises imparted in consequence of said improvements, this benefit being secured to him either by assigning the improved portion of the premises to him without charging the improvements, or by sale of the premises, the increased

purchase-money in consequence of the improvements being allowed him in the distribution of the proceeds of said sale. The equity however of the improving tenant to this added value does not depend upon the mode which was adopted in these cases to enforce it, but it rests upon the facts of each case, and is applicable to every case where the facts are of such a character as to demand it, and where at the same time it can be enforced without injustice to others, as where the improving tenant has reason to believe that he is the exclusive owner, or where it would be a great and obvious hardship to deprive him of it, and at the same time accompanied with the further fact that the allowance can be made consistently with the equity of the co-tenants. Story Eq. Juris., *supra*.

Now in the case at bar the improvements were made while the improving tenant was in the exclusive possession of the premises, holding as sole owner, and before even any claim or notice of opposing title had been made upon her. There was no doubt therefore as to the equity of her claim to the value of the improvements erected by her, and inasmuch as the added value of these improvements, independent of the land, was fully ascertained by testimony taken before the master at the time and with the view to the partition sought, the enforcement of this equity here, and under the facts of the case, was not only proper, but was in full accord with the cases *supra*, sustaining the modification of the general rule. It will be seen at once therefore that there is no conflict between the case at bar and the cases referred to in the petition and cited to the general rule. Nor were said cases overlooked by us in rendering our judgment.

We have been more elaborate in giving the reasons for dismissing this petition than usual, for the reason that there is a manifest misapprehension on the part of counsel as to the decisions of this court on the subject of improvements by co-tenants. The petition is dismissed.

Petition dismissed.

McLure v. Lancaster.

MCLURE V. LANCASTER.

(41 E. C. 373.)

Marriage—when gift presumed from wife to husband.

Where a wife permitted her husband for ten years to manage her property, receive the rents and profits and expend the surplus, without question, a finding of a gift is warranted. (*See note, p 261.*)

ACTION for rents of land. The opinion states the case.

F. S. R. Thomson, for appellant.

Bobo & Carlisle and *Duncan & Sanders*, contra.

SIMPSON, C. J. In 1871 the plaintiff intermarried with David A. McLure. At her marriage she owned certain real and personal property, which she, shortly after said marriage, conveyed by separate deeds to her husband, conditioned that she should have the use and enjoyment of the rents and profits during her life, and in case of the death of her husband before her death, the property was to revert to her, etc. The husband died in 1882, having managed the farm during the marriage. After the death of the husband, the action below was brought by the plaintiff, the widow, against the executors of the deceased to recover the rents and profits of the land accrued during the time the husband had been in possession.

The case was tried by the jury, who found for the defendants. The appeal is founded upon alleged errors in the charge of the Circuit judge, his honor, Judge Cothran. The exceptions are numerous (fourteen in number); the most of them however seem to be objections to certain remarks made by the Circuit judge in the course of his general charge, detached from the context. The object of exceptions in a case at law is to bring up some distinct principle or question of law claimed to have been violated by the Circuit judge, and to present it in a distinct and tangible form, so that it may be reviewed by this court. Several of the exceptions here fail to conform in a strict sense to this rule. It will not be necessary therefore to take them up *seriatim*, especially as when consolidated they present but few legal points. These points involve the rights of married women under the Constitution and statutes of the State,

and of gifts made by them to their husbands, arising from presumption inferred from conduct, acquiescence, or otherwise. The Circuit judge charged upon these points, illustrating his views by the incidental remarks which are the foundation of many of the exceptions. Our examination has been directed to the principles laid down in the charge thus illustrated.

As to the rights and powers of a married woman, the judge charged, that with reference to any property that she may acquire by gift, grant, devise, inheritance, or otherwise, a married woman, with regard to that property, was as if she were unmarried, and that this right admitted of business transactions between husband and wife, as if they were *non covert*. There certainly can be no objection to this under our recent decisions. *Witsel v. Charleston*, 7 S. C. 88; *Pelzer v. Campbell & Co.*, 15 S. C. 597. When the judge confined such transactions to the property of the wife, it cannot be said that he went too far. He then charged, in substance, that in reference to gifts from the wife to the husband, it is not necessary to show a direct and positive transaction of that nature, or an express gift, but that it might be inferred from circumstances, such as appropriation by the husband with the knowledge and consent of the wife, her acquiescence, a long acquiescence being stronger than a short one, the husband being the sole manager, claiming and using the property as his own, and spending the overplus as he pleased, with the cognizance of the wife, and without objection.

He further charged that owing to the relation between husband and wife, the law allowed the most favorable presumption, when the wife permitted the husband to receive and enjoy the income of her property, but that the rule where strangers were concerned was more strict and severe. He, in addition, distinctly stated to the jury that while the wife might permit her husband to make use of such income, and acquiesce therein, yet that she had the right, if dissatisfied, to object and take charge herself, and even lease it out to others. And finally, after propounding certain questions to the jury explanatory of the principles laid down, so as to enable the jury to apply these principles to the testimony, he repeatedly said to them, that it was for them, and them alone, to pass upon that testimony, and to find the facts as evidenced thereby.

Now was there error in the ruling of the Circuit judge, as to gifts presumed by the circumstances referred to? In the case of

McLure v. Lancaster.

Reeder v. Plinn, 6 S. C. 240, it was held: "Where a wife permits her husband to manage her separate estate for a number of years, and dispose of the income as he sees fit, equity treats it as a gift to him." Further: "A wife, by negligence, or acquiescence, may forfeit her right to equities against her husband, which otherwise she might have asserted." This is even stronger than the charge of the judge. The court in that case, after stating the rule, and saying that there was no difference between a case where the husband secured the income from a trustee, and where he was in the immediate management himself, said: "That the rule rested on the assumption of either an express gift of the income to the husband, or one implied from her acquiescence." Citing *Hill Trust*. 425; *Powell v. Hankey*, 2 P. Wms. 82; *Beresford v. Archbishop*, 13 Sim. 643; *Thrupp v. Harman*, 3 M., J. & K. 513, and *Charles v. Cocker*, 2 S. C. 136. And that this rule is stronger in matters between husband and wife than between strangers, as charged by the judge, see the remarks of Chancellor KENT in *Methodist E. Church v. Jaques*, 3 Johns. Ch. 79.

We think the charge of the judge, when taken as a whole on the questions referred to above, was in accordance with the law, and fully supported by the authorities cited *supra*, and we do not see that the various detached portions of the charge found in the several exceptions where they are presented, modified or in any way relaxed the rule, or general principle laid down for the government of the jury, or was calculated to mislead them.

Inasmuch as the jury found for the defendant, doubtless on the question of gift, it is hardly necessary to discuss the question of the six years to which the judge limited the jury, in case they found for the plaintiff, nor the averaging of the rents with the improvements considered. If there was a gift, these matters were immaterial, but even if they were before us properly, we think the charge was right.

There was no error in refusing the motion for a new trial.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Lyon v. Green Bay & Minnesota Ry. Co.*, 42 Wis. 548, the court said: "We understand it to be well settled, that a wife who permits her husband, without objection, for a long series of years, to receive and appropriate to his own use, or to their joint use, the income of her separate estate, cannot compel him to account to her therefor until such permission is revoked by her, and then only from the time of such revocation.

State v. Bundy.

A different rule might give the opportunity to mislead persons dealing with the husband, and thus open a door to fraud.

"In a well considered opinion by Chancellor COOPER, in the late case of *Lishey v. Lishey*, in the Chancery Court of Tennessee, 2 Tenn. Ch. R. 5, the rule is so well stated that we cannot do better than to extract at some length from the opinion. After quoting from Lord MACCLESFIELD in *Powell v. Haakey*, 2 P. W. 82, and from Lord HARDWICKE in *Bidout v. Lewis*, 1 Atk. 269, the chancellor says: 'The weight of authority, in accordance with these rulings, undoubtedly is, that if the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him. And this, if the husband be himself trustee. *Canton v. Bidout*, 1 Mac. & G. 599. The wife's consent to the husband's receipt of the income *de anno in annum* is presumed, and that such consent continues until revoked by something expressed or fairly implied. *Squire v. Dean*, 4 Bro. C. C. 326; *Smith v. Lord Camelford*, 2 Ves. Jr. 716; *Milnes v. Busk*, 2 Ves. Jr. 496; *Dalbiac v. Dalbiac*, 16 Ves. Jr. 126; *Bartlett v. Gildard*, 3 Russ. 155; *Buckridge v. Glasee*, Cr. & Ph. 187; *Beresford v. Archbishop of Armagh*, 13 Sim. 643; *Payne v. Little*, 26 Beav. 1; *Gardner v. Gardner*, 1 Giff. 126; *Kelly v. Dawson*, 2 Mol. 87; *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 79.' The quotation from Lord HARDWICKE is as follows: 'I allow that it is a general rule, where a wife accepts a payment, short of what she is entitled to, or lets the husband receive what she has a right to receive to her separate use, it implies a consent in the wife to submit to such a method, where the husband and wife have cohabited together for any time after.' Many of the cases cited by Chancellor COOPER have been examined, and it is believed they sustain the doctrine laid down by him."

STATE V. BUNDY.

(M S. C. 430.)

Criminal law — insanity — burden of proof.

Where insanity is pleaded in excuse of homicide it must be proved by a preponderance of evidence.

Mere drunkenness is no excuse for crime.

The test of criminal responsibility is the knowledge that the act was wrong.

CONVICTION of murder. The opinion states the case.

Stanyarne Wilson, for appellant.

Duncan, solicitor, *contra*.

State v. Bundy.

McGOWAN, J. The defendant, Edward Bundy, was indicted for the murder of Annie Heckman, at Spartanburg, on March 5, 1885. The facts do not appear in the brief, but we infer from the charge of the judge, which is reported in full, and from the exceptions, that no question was made as to the fact of killing, and that the only defense was that the defendant, when he committed the act, was *non compos mentis* and not criminally responsible. It is stated that there was evidence that the defendant had some liquor on the evening of the homicide, which occurred about half-past eight o'clock at night, but there was no evidence whatever of any previous habit of gross intemperance of the defendant or consequences affecting his health or mind resulting therefrom. It is also stated that soon after the killing the defendant made efforts to take his own life.

The jury rendered a verdict of guilty and the defendant was sentenced to be executed August 7, 1886. From this sentence the defendant appeals, on the following grounds :

Because his honor erred in charging :

1. "That the presumption that a man is sane is a presumption of the truth of the fact beyond a reasonable doubt.

2. "That in order for a defendant to relieve himself from responsibility for a criminal act by reason of mental unsoundness, he must show that he was under a mental delusion by reason of mental disease, and that at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable, either the one or the other.

3. "That when a man is charged with crime, the fact that he was drunk at the time of its commission does not discharge him from the responsibility of a sober man.

4. "That if by insulting words or abusive epithets a man is thrown into a tumult of excitement, and sudden heat and passion induced by such a cause, and human life is taken, that is not manslaughter ; that is murder.

5. "That the law requires a defendant to establish that he was insane by the preponderance of the testimony."

Because his honor refused the defendant's requests to charge :

6. "That if upon the whole evidence the jury believe that the accused at the time of the act was under the influence of a mind diseased, either intellectually or morally, and was unconscious that he was committing a crime, he should be acquitted.

7. "That if the jury are satisfied from the evidence that at the time of the act the prisoner was laboring under mental derangement, whether partial or general, of a degree sufficient to have controlled his will and to have taken from him freedom of action, the verdict of the jury should be 'not guilty.'

8. "That if by reason of mental derangement at the time of the act the prisoner had not power to control the disposition or impulse to commit the deed, he should be acquitted.

9. "That if the jury believe that there was an attempt of the defendant to kill himself soon after the commission of the act, this is a fact that should be considered in weighing the evidence as to insanity.

10. "That intoxication can be looked to in determining whether the killing was done with premeditation or deliberation. If the jury believe that at the time of the act he was by reason of intoxication or any other cause in such a condition as to render him incapable of a deliberate and premeditated purpose, they should find him guilty of manslaughter.

11. "That drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of homicide, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition, as drunk or sober, is proper to be considered. The degree of the offense depends entirely upon the question whether the killing was willful, deliberate and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which according as they were present or absent, determine whether the killing was murder or manslaughter.

12. "That if the jury believe that the purpose to take life had its inception and was carried into effect while the defendant was in a state of mental confusion, whether from drink or other cause, which rendered him incapable of calm reflection or of forming a deliberate design to take life, the offense committed cannot be murder."

Exceptions 1 and 5 allege that the judge committed error in charging that the presumption that a man is sane is a presumption

State v. Bundy.

of the truth of the fact beyond all reasonable doubt, and the law requires a defendant to establish that he was insane by the preponderance of testimony. It is argued that when the prisoner's sanity is questioned and put "in issue" by him, the State must establish sanity, like any other fact, "beyond all reasonable doubt." When crime is charged, it must of course be proved, for the double reason that every man is presumed to be innocent and he who alleges must prove. In criminal proceedings which touch the life or liberty of a citizen, this rule is so exacting as to require the proof to be clear "beyond a reasonable doubt," otherwise it is considered better that the accused should escape. There is no doubt that an indictment for murder substantially alleges not only the fact of homicide, but also a criminal intent which pre-supposes reason.

But as the usual condition of men is that of sanity, there is a presumption that the accused is sane, which certainly in the first instance affords proof of the fact. *State v. Coleman*, 20 S. C. 454. If the killing and nothing more appears, this presumption, without other proof upon the point of sanity is sufficient to support a conviction, and as the State must prove every element of the crime charged "beyond a reasonable doubt," it follows that this presumption affords such proof. This presumption however may be overthrown. It may be shown on the part of the accused that the criminal intent did not exist at the time the act was committed. This being exceptional is a defense, and like other defenses must be made out by the party claiming the benefit of it. "The positive existence of that degree and kind of insanity that shall work a dispensation to the prisoner in a case of established homicide is a fact to be proved as it is affirmed by him." *State v. Stark*, 1 Strob. 506.

What then is necessary to make out this defense? It surely cannot be sufficient merely to allege insanity to put his sanity "in issue." That is merely a pleading, a denial, and ineffectual without proof. In order to make out such defense, as it seems to us, sufficient proof must be shown to overcome in the first place the presumption of sanity and then any other proof that may be offered. This need not be done "beyond a reasonable doubt," for that would be a misapplication of the rule, which only applies to the evidence to sustain the charge on the part of the State, but by "the preponderance of evidence," showing want of sanity with reasonable certainty; this degree of evidence on the part of the defendant answer-

State v. Bundy.

ing to and satisfying the requirement that the State must establish every element of the crime charged "beyond a reasonable doubt." "Where the State fully proves a *prima facie* case, and a special defense, such as insanity, *alibi*, etc., is interposed, it must be established only by such a preponderance of evidence as will satisfy the jury that the charge is not sustained "beyond all reasonable doubt." *State v. Paulk*, 18 S. C. 515; *Lawson's Insanity*, 418.

Exceptions 3, 10, 11 and 12 complain that it was error in the judge to charge that voluntary drunkenness is no excuse for crime in the sense that the jury, in considering the question of malice, may not look to the unnaturally excited condition of the mind produced by temporary intoxication. We do not see that the facts of this case as stated can be considered as properly raising the question as to the effect of drunkenness in one who commits a homicide under its influence. There was no effort to prove any permanent disease of the mind resulting from long habits of gross intemperance, nor even a temporary fit of drunkenness at the time the act was committed, the only proof upon the subject, as stated, being that the prisoner had "some liquor" during the evening before the homicide was committed.

But if that meagre proof is regarded as sufficient to raise the question, and the prisoner must be assumed to have been in a state of temporary intoxication when he committed the homicide, that would not excuse the crime. We do not think that our case of *State v. McCants*, 1 Speer, 393, holds peculiar doctrines on this subject. Some cases may be found which suggest limitations of the rule, especially as to reducing murder to manslaughter by the indulgence extended to the natural weakness of "sudden heat and passion." But we think that the broad current of modern opinion holds the wise old doctrine that voluntary drunkenness of whatever degree is no excuse for crime committed under its influence. Any other principle would be destructive to the peace and order of society. Every murderer would soak himself in liquor for the double purpose of nerving himself for the act and of sheltering his intended crime. Sir Matthew Hale, in his "History of the Pleas of the Crown," says: "The third kind of *dementia* is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many more into a perfect but temporary phrenzy. But by the laws of England such a person shall have no privilege by his voluntarily contracted madness."

State v. Bundy.

Exceptions 2, 6, 7 and 8 complain that the judge erred in not charging that as insanity is a disease of the intellectual or moral faculties, one or both, the test of criminality was not whether the party had knowledge of right and wrong, but whether he had the power to refrain from doing what was known to be wrong. As was said in the case of *State v. Stark, supra*, the subject of the mind and its influence upon the body is very difficult and obscure even to the most learned. The books of medical jurisprudence contain much controversy as to what infirmities of the mind should exempt from criminality. Since the famous cases of Hatfield, who under an insane delusion shot at the king, and of McNaghten for killing Mr. Drummond by mistake for Sir Robert Peel, these discussions for the most part have been directed toward what has been called insane delusion, moral insanity, or uncontrollable impulse. See chapter 19 of Sir James Stephen's History of the Criminal Law. On a subject so intangible and of which so little can be clearly known we would not, in the spirit of dogmatism, undertake to say that there is no moral as distinguished from intellectual insanity. It seems to us, however, that in the view suggested the difficulty would be great, if not insuperable, of establishing by satisfactory proof whether an impulse was or was not "uncontrollable."

But we see nothing in this case which required the Circuit judge to enter upon the subject. As he stated, he was not called upon to charge abstract propositions that the evidence did not make necessary. "It is only proper that I should charge you in regard to such legal principles as arise out of the evidence." As applicable to the facts of the case, he instructed the jury as follows: "In order to relieve himself of responsibility for a criminal act by reason of mental unsoundness, he (the prisoner) must show that he was under a mental delusion by reason of mental disease, and that at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable, either the one or the other. Because notwithstanding his mind may be diseased, if he is still capable of forming a correct judgment as to the nature of the act, as to its being morally or legally wrong, he is still responsible for his act and punishable as if no mental disease existed at all."

We cannot say that this was error of law. The test here given to the jury was, as we understand it, the ordinary test in such cases; the test authorized by the opinion of all the judges of England in answer to the questions of the House of Lords growing out of *Mc-*

Habenicht v. Rawls.

Naghten's case; the test applied in the case of the *United States v. Guileau* for shooting President Garfield, and in many other cases in most of the States. See Lawson on Insanity as a Defense to Crime, 270, and following pages.

The judgment of this court is, that the judgment of the Circuit Court be affirmed, and that the case be remanded to the Circuit Court for the purpose of enabling that court to assign a new day for the execution of the sentence before imposed.

Judgment affirmed.

HABENICHT V. RAWLS.

(24 S. C. 461.)

Marriage—power of wife to contract as surety.

Under a statutory authority for married women to contract "as to their separate property," they cannot charge it as mere sureties.

ACTION on promissory notes. The opinion states the facts. The defendant had judgment below.

John T. Sloan, Jr., and W. H. Lyles, for appellant.

John Bauskett, contra.

McIVER, J. On January 24, 1883, the defendants, Rawls and Wilhalf, made the notes sued on payable to the plaintiff, and before their delivery to him they were indorsed by the other two defendants, Jennie Agnew then and now being a married woman. The notes were given in discharge of a lien held by the plaintiff on the stock of goods belonging to Rawls and Wilhalf. Mrs. Agnew had no interest in the stock of goods and received no consideration for her indorsement. She was therefore practically a mere surety for the debt of another; and the sole question raised by this appeal is whether she, being a married woman, was capable of making such a contract.

At common law there is no doubt that she had no such capacity, and therefore the inquiry is whether she has, by statute, been endowed with the power to make such a contract. That the act of 1870, incorporated in chapter C of the General Statutes of 1872, page 482, section 3, did confer upon a married woman the power to make any contract which a *feme sole* could make, even to the ex-

Habenicht v. Rawls.

tent of becoming surety for her husband, was settled by the cases of *Pelzer v. Campbell*, 15 S. C. 581, and *Clinkscales v. Holl*, 15 S. C. 602. But at the very next session of the general assembly, which convened only a very few days after the decisions in the cases just recited were rendered, the law which had been thus construed in those cases was altered so as to limit the power of a married woman to contract, and the question is as to the extent and effect of that limitation.

By the law, as it formerly stood, it was declared that "a married woman shall have the right * * to contract and be contracted with in the same manner as if she were unmarried;" but by the law as it stood at the date of the alleged contract here in question, and still stands, it is declared that "a married woman shall have the right * * to contract and be contracted with, 'as to her separate property,' in the same manner as if she were unmarried"; the five words quoted having been inserted as an amendment to the law as it formerly stood; so that the question raised by this appeal is narrowed down to the inquiry as to the effect of those five words. It seems to us that the most natural and the proper construction of the terms of this act, as amended, is that adopted by the Circuit judge; that the contract which a married woman is therein authorized to make is "as to her separate property, must have reference to her separate property, must concern her separate property."

It will be observed that the question is as to what contracts a married woman may make, and not as to their effect after they have been made. If a given contract is one that the law authorizes a married woman to make, then its effect is, and must necessarily be, the same as that of a contract of a person not laboring under any disability. It is very clear that the legislature intended to make some alteration in the law as it formerly stood, and we think it equally clear that the intention was to limit the power of a married woman as to the kind of contracts which she was permitted to make, viz., to those in relation to her separate property. As we have seen, prior to the amendment a married woman could make any kind of contract which a person *sui juris* could make, and the intention undoubtedly was to alter this, and hence her general power to contract was qualified by the words constituting the amendment, so that, while formerly she had the unlimited power to contract, now she can only make contracts "as to her separate property."

We are unable to discover any thing in the act which indicates that the intention of the legislature was simply to confine her liability on any contract, which she might choose to make, to her separate estate, as is contended for by appellant. There is nothing in the act which shows that the attention of the legislature was directed to the kind of property which could be held liable for the performance of a married woman's contract; and on the contrary, the language used shows that the legislative mind was directed to the kind of contract which she was to be permitted to make, and not to the kind of property which could be resorted to in case of a breach of the contract. Very recently, before the law was amended, it had been determined, as we have seen, although there was no little contrariety of opinion upon the subject, as is well known, that a married woman had the same capacity to make any kind of contract as any other person, and the irresistible inference is that it was this that the legislature intended to alter, so as to confine the contracting power of a married woman to a certain class of contracts, to-wit, those which were made as to her separate estate.

We are not aware that any controversy had arisen or any adjudication had been made as to the kind of property which could be made liable for the breach of a married woman's contract, and therefore, no occasion had arisen for an alteration of the law in that respect. Indeed we do not see how such a controversy could have arisen, for the old Code, as well as the Code of 1882, expressly provided that damages recovered against a married woman could only be collected out of her separate estate. Section 298 of the old Code, which is in this respect the same as section 296 of the amended Code, provides that "in an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise." And in section 310 of the old Code, the provision was that "an execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate estate and not otherwise;" and the same provision is found in section 307 of the present Code. So that it is very clear that the construction contended for by the appellant, to wit, that the amendment now under consideration was simply designed to limit the liability of a married woman on her contracts to her separate

Liabenicht v. Rawls.

estate, cannot be the correct one; for such a construction would make the amendment in question wholly unnecessary, as that was the law before.

We are therefore of opinion that the object of the amendment was not to indicate the kind of property which could be made liable for the breach of a married woman's contract, but to limit her right to contract, so that she could only make such contracts, as at the time they were made, related to or concerned her separate property. Hence, before a married woman can be made liable for the breach of a contract alleged to have been made by her, it must be made to appear, either from the inherent nature of the contract or otherwise, that the contract was made in relation to or concerned her separate property. Even if she declares in express terms her intention to bind her separate estate, that alone will not be sufficient to render the contract valid, for the question is as to her power, which is to be determined by the nature of the contract itself, and not as to her intention to bind her separate property. If therefore a wife should sign a note as surety for her husband, or indeed for any other person, and should declare in the note in express terms her intention to bind her separate estate, that would not make the contract valid as to her unless it was made to appear that the contract, though executed by her as surety, was designed to benefit her separate property or in some other way related to or concerned such property.

We have not deemed it necessary to go into a consideration of the very numerous cases elsewhere upon questions similar to the one now before us; for while the statutes of the various States are somewhat like our own, yet they differ sometimes very materially in their phraseology, and in the very great conflict of authority abroad we have thought it more likely that we would reach a correct solution of the question by confining our attention to the terms of our statutes, viewed in the light of our own past legislation and adjudications.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

SIMPSON, C. J., concurred.

McGOWAN, J. I concur in the result. As the purpose of the act manifestly was to confer upon a married woman powers beyond

 McLure v. Melton.

what she possessed before, I cannot suppose that by the insertion of the words, "as to her separate estate," it was intended to defeat that object entirely as to contracts. The same act, in conformity to the Constitution, confers the powers "to bequeath, devise and convey her separate estate in the same manner and to the same extent as if she were unmarried," and in order to harmonize the different provisions I incline to think that the intention of the amendment was to limit the power of a married woman to such contracts as express an intention to bind her separate property, such as are made with express reference to, that is to say, "as to her separate property."

McLURE V. MELTON.

(24 S. C. 559.)

Constitutional law — obligation of contract — vested rights.

A change in the law prescribing the order of payment of the debts of a decedent does not impair the obligation of a contract nor a vested right.*

ACTION to marshal assets. The opinion states the case.

J. H. Rion, A. S. Douglass and S. P. Hamilton, for appellants.

McLure & McLure, J. F. Hart and Paul Hemphill, contra.

McIVER, J. The facts of this case, so far as necessary for a proper understanding of the points made by the several appeals, are substantially as follows: On July 9, 1876, Geo. W. Melton died intestate, and his estate being found to be largely insolvent, this action was commenced in July, 1877, to marshal the assets. Creditors were called in and numerous claims were established, but the only ones that need be specially stated are the following: A note under seal to G. R. Ratchford & Co., bearing date February 22, 1859; a note under seal to Dr. A. P. Wylie, bearing date May 3, 1872; a note under seal to Samuel D. Melton, bearing date February 1, 1871; a bond, secured by a mortgage of real estate to Duvall, sheriff, dated June 4, 1875, which has been transferred to the defendant, Kerr, as clerk of the court for Fairfield county; and "

* See *State v. City of New Orleans*, ante, p. 168.

bond, secured by a mortgage of real estate, to Hopkins, Dwight & Co., dated May 19, 1876.

The mortgage to Hopkins, Dwight & Co. has been foreclosed, and the proceeds of the sale of the mortgaged premises being insufficient to pay the debt, the balance is now set up against the general assets, and preference for it is claimed as a mortgage debt. The land covered by the Kerr mortgage was sold under an order in this cause before Kerr became a party by proving his mortgage debt; and after that sale, Kerr not having got the proceeds, he brought his action to foreclose his mortgage against the purchaser at the sale made under the order in this cause, and the land was again sold, but the proceeds of this last sale being insufficient to pay his debt, the balance is now set up as a mortgage debt against the general assets. The Circuit judge held that the liens of the two mortgages having both been exhausted, the rank of these debts must be determined by the nature of the obligations which they were given to secure, and cannot be classed as mortgages. The appellants question the correctness of this ruling, and the defendant, Kerr, also appeals upon the ground that the Circuit judge erred in not holding "That so much of the proceeds arising from the sale of the mortgaged premises under the order of the court in this action as are in the hands of the clerk of this court be applied to said mortgage debt."

In relation to this last mentioned ground of appeal, we have only to say that we are unable to discover where any such question was made in the court below. It does not appear that the referee ruled, or was asked to rule upon it, and no such question was considered or passed upon by the Circuit judge, and therefore we do not see how we can consider it. There is nothing in the "case," as prepared for argument here, to show that an order directing the proceeds of the first sale to be applied to the Kerr mortgage was ever applied for. Whether such an order should be granted, or whether Kerr has elected to ignore the first sale by bringing his action to foreclose his mortgage against the purchaser at such sale, and thereby lost the right to claim the proceeds, or whether the purchaser at that sale may not have equities which entitle him to be heard, are all questions upon which we do not desire to be understood as intimating any opinion, inasmuch as we do not think the question presented by this ground of appeal is properly before us.

The Circuit judge based his decision upon the main point involved in these appeals, that is, as to the rank of the claims of Hopkins, Dwight & Co. and Kerr, clerk, upon a recent decision of this court in the case of *Piester v. Piester*, 22 S. C. 139, and there can be no doubt that if that case applies to this, it fully sustains the decree of the Circuit judge. The appellants however contend that the case of *Piester v. Piester*, cannot be so applied, for the reason that to so apply it would impair the obligation of contracts or would divest vested rights, inasmuch as at the time of the death of the intestate, and at the time of the making of one of the contracts in question—that of Hopkins, Dwight & Co.—the law, as then declared by the case of *Edwards v. Sanders*, 6 S. C. 316, required that the balances due on these two debts should be ranked as mortgages, and as such entitled to priority over specialty debts; and that the subsequent change in the law, as it is called, by the decision in *Piester v. Piester*, cannot have the effect of divesting the rights of these appellants which became vested at the time of the death of the intestate, under the law as it was then declared to be.

For a clearer understanding of these questions raised, it may be well to repeat here the dates of the several transactions and matters referred to. The date of the sealed note to Ratchford & Co., one of the respondents, is February 22, 1859; the sealed note to S. D. Melton, February 1, 1871; the sealed note to Wylie, May 3, 1872; the Kerr bond and mortgage, June 4, 1875; the bond and mortgage to Hopkins, Dwight & Co., May 19, 1876; the death of the intestate, July 9, 1876; the decision in the case of *Edwards v. Sanders* was filed October 14, 1875, though the book of reports in which it is found was not published until some time in the year 1877; and the decision in the case of *Piester v. Piester*, filed January 10, 1885, and the decree appealed from May 20, 1885.

The construction which is now placed upon the statute prescribing the order in which the debts of a decedent must be paid is the same as that which was adopted by the law court in the case of *Tunno v. Happoldt*, 2 McCord, 188, as far back as 1822, and reaffirmed by the court of equity in the case of *Kinard v. Young*, 3 Rich. Eq. 247, in 1846. Thus the law stood unquestioned, so far as we are informed, down to the year 1875, when the decision in *Edwards v. Sanders*, *supra*, was made, overruling the two former cases and placing upon the statute the construction now contended for by the appellants. The last-named decision does not seem to

McLure v. Melton.

have been followed in a single instance; and from what is said in the case of *Piester v. Piester*, it would seem to have been never satisfactory to the profession, and that at the first opportunity which was afforded it was overruled, the legislature in the meantime having, by the act of 1878 (16 Stat. 686) shown its dissatisfaction with the construction therein adopted, by declaring: "That in the administration of the assets of a decedent, mortgages shall not be entitled to a priority over rents, debts by specialty or debts by simple contract, except as to the particular parts of the estate affected by the liens of such mortgages. That after the property covered by the liens is exhausted, the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure." It is true that in the case of *Piester v. Piester*, no express reference is made to the difference in the phraseology of the original act of 1789 and that adopted when it was incorporated in the general statutes of 1872, upon which stress seems to be laid in the argument of one of the counsel for appellants, but the whole subject was carefully considered before any conclusion was reached. Nor do we find in the case of *Edwards v. Sanders* that any allusion was made to such change in the phraseology as a reason for a change in the construction of the act.

The question then is, does the decision in the case of *Piester v. Piester* effect such a change in the law as would forbid its application to the case under consideration; because it would impair the obligation of a contract or would divest rights vested under the law as declared in the case of *Edwards v. Sanders*? As we have seen, the proper construction of the statute in question had been settled, for a long series of years, by decisions of both the courts of final resort in this State, in accordance with the view now declared to be the proper construction of that statute; and it seems to us that it would be going very far to say that a single isolated decision, never recognized or followed in any subsequent case, and never recommending itself to the approval of the profession, should be regarded as having the effect of changing the law; on the contrary, whatever may be the opinions of the individuals as to its correctness, it must be regarded as an erroneous declaration of what was the law, and as only the law of the particular case in which it was made.

We do not think that the case of *Herndon v. Moore*, 18 S. O., 339, relied on by the appellants, is applicable here. In that case,

there were many potential elements, such as long and universal acquiescence, sales made and money paid, which are not found here. Moreover, it will be observed that the majority of the court concurred only in the result, and hence that case can only be regarded as authority on the precise question therein adjudged, as presented under the special circumstances therein stated.

It is true that the Supreme Court of the United States have, in numerous cases, held that where a contract is valid at the time it is made, under the laws of the State as then expounded, its validity or obligation cannot be impaired by any subsequent judicial decision giving a different exposition of the law; and this court has, in two cases (*The Bond Debt* cases, 12 S. C. 282, and *Whaley v. Gaillard*, 21 S. C. 572), deferred to the authority of that court in that class of cases which involve the question whether a particular law or decision is in violation of that clause of the Constitution which forbids a State from passing any law impairing the obligation of a contract. But even in the Supreme Court of the United States this doctrine is confined to cases of contract, and even in such cases it is, at least doubtful whether it would be applied where, at the time the contract was made, the law had been declared only by a single isolated case, never recognized or followed, and overruled at the first opportunity presented. See the cases of *Ohio Life and Trust Co. v. Debolt*, 16 How. 432; *Gelpcke v. Dubuque*, 1 Wall. 175; *Lee County v. Rogers*, 7 Wall. 181; *Butz v. City of Muscatine*, 8 Wall. 575; *City v. Lamson*, 9 Wall. 477; *Olcott v. Supervisors*, 16 Wall. 678.

Assuming then, for the sake of the argument only, that there was a change in the law by the decision in the case of *Piester v. Piester*, before the doctrine above cited from the Supreme Court of the United States could be applied in this case, it must appear that this is a case of contract, and that to give effect to such change in the law would impair the obligation of such contract. We do not see that the law, as declared in *Piester v. Piester*, impairs or in any way affects the validity or obligation of any contract. It does not purport to interfere in any respect with the validity or binding obligation of any contract set up by the appellants. It simply declares the proper construction of a statute prescribing the order in which the debts of a decedent are to be paid.

In *Harrison v. Sterry*, 5 Cranch, 289, the question was as to the right of the United States to priority under an act of Congress. It

McLure v. Melton.

was contended that as the contract was made with foreigners, in a foreign country, the law of the place where the contract was made must govern, and under that law no such priority was recognized. But the court held otherwise. MARSHALL, C. J., while recognizing the doctrine that the *lex loci contractus* governed in expounding the contract, adds: "But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers, not by the law of the country where the contract was made." This language is quoted with approval in the subsequent case of *Suith v. Union Bank of Georgetown*, 5 Pet. 518.

We do not see then how any change in the law prescribing the order in which debts of a decedent are to be paid can be said to impair the obligation of any contract by which such debts were created. But even if such should be the case, it seems to us that the practical result in this case would be the same as that reached by the Circuit judge. For if as we concede parties are to be presumed to contract with reference to the law as it exists at the time the contract is entered, and if the law fixing the order in which debts of a decedent are to be paid enters into and forms a part of the contract by which such debts were created, then it follows necessarily that the respondents, Ratchford & Co., Dr. Wylie, and S. D. Melton, whose debts were created at a time when, under the decisions of *Tunno v. Happoldt* and *Kinard v. Young*, they were entitled to priority over the appellants, they could not be deprived of such priority by the subsequent change in the law, as it is called, by the decision in the case of *Edwards v. Sanders*, for the fact that the intestate did not die until after the so-called change was made could not affect the validity of contracts made before that time; for certainly a circumstance occurring after a contract has been made cannot be said to enter into or form a part of such contract.

But as we have said, we do not see that any change in the law prescribing the order for the payment of the debts of a decedent can be properly said to impair the obligation of any contract; and therefore whatever other objection may be urged, it is not amenable

to the charge that it violates those clauses of the Constitution of this State and the United States which forbid the passage of laws impairing the obligation of contracts.

It is contended however that upon the death of a decedent, the rights of his creditors to the payment of their debts, according to the law then in force, become vested, and that such vested rights cannot be impaired or taken away by any subsequent change in the law. Applying this doctrine to the facts of this case, appellants insist that under the law, as it was declared to be by the case of *Edwards v. Sanders*, at the time of the death of the intestate, they were entitled to priority, and that any subsequent change in the law cannot deprive them of such priority. Without repeating here what we have said above (that we do not assent to the fundamental proposition upon which the doctrine contended for rests, to-wit, that the law ever was as it was incorrectly announced to be in *Edwards v. Sanders*, we will, for the sake of argument only, assume the contrary, and proceed to consider the question whether the appellants can claim such vested right of priority as that it cannot be divested by any change in the law.

We do not understand that there is any thing in the Constitution of the United States which forbids a State from enacting a retrospective law, or a law divesting a vested right, provided in so doing the obligation of a contract is not impaired. *Watson v. Mercer*, 8 Peters, 88; *Jackson v. Lamphire*, 3 Peters, 280; *Satterlee v. Mattheuon*, 2 Peters, 380; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420; *Curtis v. Whitney*, 13 Wall. 68. Nor is there any provision in the Constitution of this State, as in some of the other States, forbidding the enactment of retrospective laws, or any provision which in express terms forbids the enactment of a law divesting vested rights, though certain safeguards are thrown around such rights by the provisions of sections 14 and 23 of article I of the Constitution.

In the case of *Miles v. King*, 5 S. C. 146, it was held that the act of 1866, which required all instruments in writing of which a record is required by law, and of which the record has been lost or destroyed, but the original preserved, to be again recorded within a specified time; otherwise, that they should not prevail as liens against subsequent purchasers or creditors without notice, was a constitutional and valid law. Now in that case the plaintiff, by recording his mortgage, which was executed in 1855, under the law

McLure v. Melton.

then of force, had acquired a vested right, so to speak, of priority over all subsequent purchasers and creditors, and yet it was held that such vested right was divested by his failure to comply with the requirements of the subsequent act of 1866. In delivering the opinion of the court in that case, MOSES, C. J., uses this language: "The general assembly has power to divest vested rights, and to enact statutes retrospective in their action, provided they do not impair the obligation of a contract." And again: "A vested right may be divested by the legislature, unless it exists by virtue of or in the nature of a contract."

Now while we are not prepared to indorse this language without some qualifications, as it would, in its unqualified form, imply that the legislature had power to divest a vested right of property, yet we agree that every vested right, so-called, is not beyond the reach of the legislature. It is very difficult, if not impossible, to define precisely those rights which are so vested as to be protected from legislative interference as is shown in the discussion of this subject by that eminent author, Judge Cooley, in his work on Constitutional Limitations, and we shall not undertake to do so on the present occasion. It is sufficient for us to say that the right of priority given to certain classes of creditors by the statute prescribing the order in which the assets of a decedent's estate shall be applied to the payment of his debts is a mere direction to the executor or administrator as the case may be, as to the manner in which he shall administer such assets, which is at all times subject to legislative control, and does not confer any such vested right upon the creditors as to place it beyond such control.

This seems to have been the principle upon which the Supreme Court of the United States acted in *Bunk of Hamilton v. Dudley*, 2 Peters, 492. In that case an act of 1795, which seems to have been of force at the time of the death of the intestate, and at the time letters of administration upon his estate were granted, authorized administrators to sell lands for the payment of debts. This act was repealed on June 1, 1805, and in August following the Court of Common Pleas granted an order authorizing the administrators to sell the land in controversy, who proceeded to do so and the question was as to the validity of the sale. It was contended on the part of the plaintiffs in error that the interest of the administrators in the real estate as trustees for the creditors was a vested interest which the repeal of the law could not divest. But

McLure v. Milton.

the court held otherwise, and MARSHALL, C. J., in delivering his opinion, used this language : " The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature."

It is not to be denied that some of the language used by that distinguished jurist, JOHNSTON, Ch., in the case of *Morton v. Caldwell*, 3 Strob. Eq. 161, when considered apart from the question then under consideration, does seem to support the view contended for by the appellants. But the question in that case was so wholly different from the one now under consideration that to apply the language there used to a totally different question would inevitably lead us into error. The question there was to what period of time must we look in order to ascertain the amount of a claim against a decedent's estate in order to determine its *pro rata* share of the assets of such estate, and the question now before us, as to whether the law-making power could not change the direction previously given as to the manner of administering the assets of a decedent's estate was not considered or even hinted at. We do not see therefore that there was any error in any respect in the judgment appealed from.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
OREGON.

FAIN V. SMITH.

(14 Oreg. 32.)

Deed — delivery — intention.

A father executed a deed of land to his two young children, but retained it in his own possession and continued to occupy and enjoy the premises until his death. *Held*, not alone sufficient to pass title. (*See note, p. 289.*)

ACTION for dower. The opinion states the case. The plaintiff had judgment below.

W. Lair Hill, for appellants.

W. H. Adams, for respondent.

LORD, C. J. This is an action in ejectment, for dower of two lots of land in Portland. The complaint alleges that W. B. Fain died on the day of , seised of estate of an inheritance in the land in controversy; that the plaintiff, who is respondent herein, is his widow, and as such is entitled to the enjoyment of a life estate of one-third of said lands, as her dower thereof. The answer denies that Fain was seised of an estate of inheritance in the disputed premises, and claims that the two defendants are the owners thereof. Wm. B. Fain is the admitted source of the title.

From the admissions in the pleadings and the facts stipulated and found the case presented is briefly thus: The plaintiff is the widow of William B. Fain, and the defendants are his children by a former wife, and the land in controversy was owned by him during the life-time of the mother of the defendants, and at the time of her death. When the defendants were children of tender years, their mother being dead and Fain at that time being the owner of considerable property besides that which is now in dispute, he signed, sealed and acknowledged, in due form of law, a deed purporting to convey the property in controversy to his two children, the defendants. This deed was never delivered to any person for the children, but remained in the possession of the grantor to the time of his death, a period of years. During that time he managed the property, and received its rents and profits. The court found as a fact, the trial being without a jury, that when Fain made the deed, it was not his intention to deliver it; and adjudged that he was at the time of his death seised of an estate of inheritance of the property in controversy, and the plaintiff was entitled to dower thereof.

Upon this state of facts a single question is presented by this appeal. Was Wm. B. Fain the owner of the land at the time of his death? If he was, it is admitted that the judgment must be sustained; otherwise it is error, and must be reversed. The general rule that a conveyance of land is not completely executed so as to vest title without delivery is not controverted; but it is insisted that the rule is not universal, and that the case under consideration constitutes an exception to which it is not applicable, either upon reason or authority. The distinction claimed is this: That in deeds where both parties are *sui juris*, there are two parties to be consulted, he who conveys the title and he to whom it is conveyed; and that when as in the great majority, or nearly all of such cases the grantee gives or obligates himself to give, something in exchange for the land conveyed, or there is a consideration of disadvantage to the grantee, such as the payment of the money, the assumption of some obligation, the carrying of some burden, which moves the grantor to execute the deed, then the transaction being simply a contract or bargain between the vendor and vendee, it is necessary there be an acceptance of the deed by the latter, which there could not be without delivery or something tantamount to delivery by the former. Hence the general rule that delivery of the deed is necessary to pass title.

Fain v. Smith.

But it is contended, when the grantee is an infant of tender years, incapable of consenting to the transaction, and the conveyance is wholly voluntary, imposing no burden on the grantee or his estate, delivery of the deed is not necessary; that such a transaction is wholly unilateral, and the grantee, who is only a passive party, is not required to do or consent to any thing in order to give efficacy to the deed; and consequently if it appear, in such case, that it was the intention of the grantor to vest the title by the deed, it is operative without delivery. It is therefore claimed, when the facts disclose as here, that the deed was made as a voluntary settlement of property on infants of tender years, and of whom the grantor is the father and natural guardian, the fact of signing, sealing and acknowledging that the deed is strong evidence, or at least sufficient, *prima facie*, to prove the intention of the grantor to vest the title, in the absence of any facts or circumstances to qualify or rebut it. There are some cases cited, to which we have not had access, in some of the authorities to which we shall presently refer, that appear to maintain this result. But the principle as deduced by the text-writers, and sustained by the current of decisions, is undeniably to the effect that delivery is essential to the validity of a deed, whether it be a conveyance for a valuable consideration, or a mere voluntary conveyance in consideration of love and affection. The delivery is defined to be that part of the operation in executing the deed by which the grantor signifies his intention when and how it is to take effect. Williams Real Prop. 147 *et seq.* It is required by the law, in order to demonstrate beyond doubt that the party making the deed meant it to be his act. No precise formula is required. It is not necessary there should be an actual handing over of the instrument to constitute a delivery. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both. Shep. Touch. 57. "But by one or both of these," SPENCER, J., said, "it must be made." *Jackson v. Phipps*, 12 Johns. 421; *Byers v. McClanahan*, 6 Gill & J. 256; *Steward v. Reditt*, 3 Md. 79.

"It is elementary law," said VIRGIN, J., "that the delivery of the deed is as indispensable as the seal or signature of the grantor. Without this act on the part of the grantor, by which he makes known first his determination to consummate the conveyance, all the preceding formalities are impotent to impart validity to it as a

solemn instrument of title. No formulary of words or acts is prescribed as essential to render an instrument the deed of a person sealing it. It may be done by acts or words, or by both, by the grantor himself, or by another, by the grantor's authority precedent or assent subsequent, with the intent thereby to give it effect as his deed," etc. *Brown v. Brown*, 66 Me. 316.

Nor is it essential to the complete execution of the deed that it should be delivered to the party intended to be benefited by it. It may be valid, although it remains in the possession of the grantor. In quite a number of cases it has been held that there may be a delivery of a deed effectual to pass the title, without an actual surrender of the possession of the deed. But none of these, when examined in the light of the facts, proceed on the ground that delivery is unnecessary. In all there is something tantamount or equivalent, from which it satisfactorily appears that there was an intention to pass the title, or what is the same, to make the deed a present operative conveyance.

In *Doe v. Knight*, 6 Barn. & C., § 671, the grantor, at the time of the execution of the deed, said in the presence of the subscribing witnesses: "I deliver this as my act and deed." The grantee was not present, and he kept possession of the deed. Afterward he handed the deed to his sister, saying: "Here, Bess, keep this, it belongs to Mr. Gamons," who was the grantee. The jury found that the grantor parted with the possession and all power and control over the deed, and that the sister held it for Mr. Gamons, free from the disposition and control of the brother. The court held this a good delivery for the grantee.

After reviewing several authorities, BAGLEY, J., said: "Upon these authorities, it seems to me that when an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that it is a valid and effectual deed; and that delivery to the party who is intended to take it, or to any person for his use, is not essential." Strong as this language may be regarded (*obiter*, as it is declared by DIXON, J., in *Prutsman v. Baker*, 30 Wis. 644; s. c., 11 Am. Rep. 592) yet eliminate the fact of a subsequent actual delivery to the sister for the use of the grantee, upon which the verdict of the jury was founded, and there is still left the decisive manifestation of the intention of the grantor to be presently

Fain v. Smith.

bound by the express words: "I deliver this as my act and deed." Certainly, there is nothing in this oft quoted case (which is considered as carrying the law as far as any of the cases), that can serve the purpose of the plaintiffs.

In *Xenos v. Wickham*, 106 E. C. L. 381, 435, and ultimately decided in the House of Lords, 108 E. C. L. 861, BLACKBURN, J., said: "As soon as there are acts or words sufficient to show that it was intended by the party to be executed as his deed, presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying, 'I deliver this as my deed'; but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear, on the authorities as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it, though of course if he has not previously assented to the making of the deed, the obligee may refuse it."

This does not seem to be any more than declaring that in determining what will constitute a sufficient delivery, the intention is the controlling element, when there are any circumstances which go to make out a delivery. It is the presence of such facts, not the absence of them, that is indicative of the intention of the party to be presently bound, to part with the deed, and of course to pass the title. All this shows that it is necessary there be something evincing the intent of the party making the deed presently binding on him, and what is that something but the facts and circumstances which go to make out a delivery, from which such intent is inferred?

In *Sowerbye v. Arden*, 1 Johns. Ch. 256, Chancellor KENT says: "A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be a clear and decisive proof that he never parted nor intended to part with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances besides the mere fact of his retaining it, to show it was not intended to be absolute."

This is the case mainly relied upon to support the plaintiff's case. But in respect to the facts and circumstances of that case, it was equally as pointed as the case of *Doe v. Knight*, *supra*, and the opinion of the chancellor must be interpreted in the light of the

facts before him. Do that, and it cannot be maintained that the chancellor intended to be understood as saying that delivery was unnecessary, or more than that the facts in evidence proved and satisfied him there was a valid delivery in law. Indeed so far as my examination has extended, the ground in equity upon which many of the deeds in the nature of family settlements have been upheld is, that there was a constructive delivery, and not that delivery was unnecessary or could be dispensed with.

In *Farrar v. Bridges*, 5 Humph. 411, a bill was filed in chancery to compel Bridges to deliver up a deed of conveyance signed, sealed and delivered, which he had retained in his custody. REESE, J., in delivering the opinion of the court, said: "If no condition is annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the grantor."

This excerpt, without reference to the facts or taken in connection with other portions of the opinion, is liable to give the impression that a delivery may be dispensed with. But the facts of the case show that a contract for the sale of the land had been consummated by the payment of the purchase-money, and that the deed was executed in pursuance thereof, all parties being present, and the subscribing witness testifying that when they left the deed was lying on the table, and that they understood that the contract of sale had previously taken place, and that the deed which they had witnessed was the final consummation of the matter. At this point REESE, J., said: "The testimony of these witnesses does not establish indeed any formal, ceremonious delivery; such delivery is not necessary, and does not very often take place," and then follows the quotation above recited. Now this does not exclude the necessity or essentiality of a delivery, or that a delivery had not been made. The evidence proved a consummated transaction, and intent to pass title, which in law includes a delivery, not "indeed any formal or ceremonious delivery," for that kind of delivery the court thought was unnecessary and seldom took place. See also *Payne v. Powell*, 5 Bush, 248; *Scrugham v. Wood*, 15 Wend. 544; *Ward v. Ward*, 2 Hayw. (N. C.) 226.

It is true that the law may imply that a party will accept that which is for his benefit, and especially of infants of tender years incapable of giving legal assent or of acceptance. But the fact of

Fain v. Smith.

acceptance, when presumed, assumes there was a delivery. It is not perceived how the application of this doctrine of the law can aid the hypothesis of the defendants. So too there are cases in which it has been held that the recording of a deed was sufficient evidence of a delivery, notwithstanding the fact that the grantor retained the custody of the deed, on the ground that it was a manifestation of the intention of the party to be presently bound, or to make the deed presently operative. But it is unnecessary to refer to these cases, for the absence of the fact renders them inapplicable.

In *Ireland v. Geraghty*, 15 Fed. Rep. 39, it was held that when a deed in fee simple was made by parents to their child, who was but little more than four months old, conveying to such child certain town lots, which were never delivered to the grantee, and considering the immature age of the grantee, it was perhaps impossible to have made such a delivery, and unnecessary that it should have been made, yet that the grantor in such deed should do some act manifesting an intention to deliver the deed, and that where such deed was never recorded or published, or in any way, by either of the parents, ever after alluded to in such way as to show that they either of them considered it a consummated transaction, the deed is an inoperative conveyance.

This case presses hard on the contention of the defendants. It shows that though a deed may be duly written and sealed and signed, it is of no effect without delivery, that unless something more is done, the transaction is incomplete to give it legal existence as a deed; that there must be something else, decisive of the intention of the grantor, from which the fact of delivery may be inferred, to make it a consummated transaction, and give it validity as a deed.

In *Wood v. Ingraham*, 3 Strob. 105, Chancellor CALDWELL said: "The current of decisions has already gone sufficiently far to enable the courts to carry out the intention of the donor, to protect the rights of the donee; but they have never presumed delivery without some evidence that it was the intention of the donor; and no case can be found that would warrant the conclusion that a delivery had been made, merely because the grantor had signed and sealed the instrument without any further act or declaration."

In *Fisher v. Hall*, 41 N. Y. 421, DANIELS, J., in delivering the opinion of the court, said: "It is not necessary that the grantee, or his agent or servant, should be present at the execution in order to have such delivery of the instrument made as will give it opera-

tive vitality and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that result. The mere subscribing and sealing, accompanied with the ordinary attestation of those acts by the witnesses, which is all there is any reason for supposing was done in the present instance, followed by the grantor keeping the deed in his custody, and his continued possession of the premises, are not sufficient to constitute a legal delivery of a sealed instrument. Several old authorities in equity were cited upon the argument, for the purpose of showing the rule to be different from this statement of it. And it must be confessed that they appeared to maintain that result; but they are evidently so directly opposite to the entire current of modern authority, both in the courts of this and the other States, as well as the United States, as to require them to be repudiated by this court. A rule of law by which a voluntary deed, executed by the grantor, afterward retained by him during his life in his own exclusive possession and control, and never delivered to any one by him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court, either of law or equity."

The result of the authorities is, that after a writing has been signed and sealed and acknowledged, any acts, or words, or circumstances decisive of the intention of the grantor to consummate and to part with it are sufficient to constitute a delivery, and give it validity as a deed. *Fulton v. Fulton*, 48 Barb. 591; *McLean v. Bullon*, 19 Barb. 450; *Brinkerhoff v. Lawrence*, 2 Sandf. Ch. 406; *Zimmerman v. Streeper*, 75 Penn. St. 147; *Shurtleff v. Francis*, 118 Mass. 154; *Bryan v. Wash*, 2 Gilm. 557; *Gunnell v. Cockerill*, 79 Ill. 492; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Cook v. Brown*, 34 N. H. 460; *Younge v. Guilbeau*, 3 Wall. 636; *Huey v. Huey*, 65 Mo. 689; *Johnson v. Farley*, 45 N. H. 505; *Brittain v. Work*, 13 Neb. 347; *Duer v. James*, 42 Md. 492; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Moak's Notes*, 13 Eng. 786. We discover no error, and the result is that the judgment must be affirmed, and it is so ordered.

Judgment affirmed.

STRAHAN J., did not sit in this case.

Fain v. Smith.

NOTE BY THE REPORTER. — See *Davis v. Cross*, 14 Lea, 687; s. c., 52 Am. Rep. 177; *Burke v. Adams*, 80 Mo. 504; s. c., 50 Am. Rep. 510; *Byars v. Spencer*, 101 Ill. 429; s. c., 40 Am. Rep. 212; *Bennesson v. Aiken*, 102 Ill. 284; s. c., 40 Am. Rep. 592.

Washburn says (Real Prop., vol. 3, p. 300, 5th ed.): "The paper need not be actually delivered to the grantee to have that effect, if the grantor when executing it intends it as a delivery, and this is known and understood by the grantee, and he and the grantor go on and act as if the estate had actually passed thereby." "In the first place, the grantor must give up control and dominion over the deed; and in the second place, the grantee must actually or by implication have accepted the deed as his own, and the estate conveyed by it." "The deed must pass under the power of the grantee or some one for his use with the grantor's consent." "But a deed may be delivered without an actual manucaption by the grantee or his agent."

A. and his wife made a deed of land to their daughter, four months old, and acknowledged it. At the time of acknowledgment, A. remarked in the child's presence, "She is early in acquiring property," and handed the deed toward her but did not put it into her hands. He kept it himself, not recording it, and after his death it was found among his papers. *Held*, no delivery, as against a subsequent grantee. *Ireland v. Geraghty*, 15 Fed. Rep'r, 85.

In *Williams v. Schatz*, 42 Ohio St. 47, the court said: "An instrument may be in the form of a deed; it may be properly signed, sealed, witnessed, acknowledged and recorded; the grantor may have capacity to convey, and the grantee to receive and hold the title; the transaction may be free from fraud or mistake; nevertheless, the instrument will not take effect as a deed unless it is delivered. But no particular form or ceremony is essential to constitute delivery; it need not be manual; it may be made by words and acts, or either, if accompanied with intention that they shall have that effect; it may be made by the grantor personally, or through his agent, to the grantee, either personally or through his agent; and it may be made *in escrow*, or to take effect immediately." So in this case, A., having executed in due form a deed of gift of real estate to his son, said to B.: "Take this deed and keep it. If I get well I will call for it. If I don't, give it to Billy," the grantee. A. was then ill, and died within a few days thereafter of the same illness, and B. then handed the deed to the grantee, who caused it to be recorded. *Held*, that this did not constitute a delivery, and the instrument was invalid as a deed.

In *Jones v. Loveless*, 99 Ind. 317, it was held that where the grantor signs and acknowledges a voluntary deed to his children as grantees, in consideration of natural love and affection, and without having such deed recorded in the proper recorder's office, seals it up in an envelope and deposits the same with his agent to be delivered to the grantees after his death, and where such deed by its terms is not to take effect until after the grantor's death, the deed is an attempted testamentary disposition of the land described therein, and if not executed with the legal formalities of a will, is inoperative to pass the title to the land to the grantees. And where the grantor dies insolvent long after he placed such deed in the hands of his agent, the subsequent delivery of the deed will be ineffectual to defeat the rights of the grantor's creditors and

administrator to sell the land for the payment of his debts; for the rule is that the doctrine of relation, which alone could give effect to such deed, will not be permitted to apply so as to do wrong or injury to strangers to the deed.

In *Goodlett v. Kelly*, 74 Ala. 218, it was held that the possession of a deed by the grantee, unexplained, or un rebutted, may be *prima facie* sufficient proof of its delivery: but when the grantee is the widow of the grantor, and it is shown by her testimony, taken in another suit, in which the deed was offered in evidence, that she found it among her husband's papers after his death, it being then unattested, and the signature of the only attesting witness being afterward affixed at her request, this is not sufficient to establish the deed, as in favor of a subsequent purchaser, seeking to enforce it against her heirs.

In *Davis v. Williams*, 57 Miss. 843, the court said: "Whether there has been such a delivery of an instrument under the seal of the maker as to make it operative as his deed, is a question of intention on the part of the maker. If he considered it as fully executed and operative, according to its terms, and intended it to have effect from a certain date, that is a sufficient delivery to give it effect. The mere fact that the maker retains the instrument in his own possession and under his own control, if he has once effectually delivered it, does not prevent it from being enforced. But it is because of the effectual delivery of the instrument, whereby it is made the deed of the party, that it is enforced; for delivery is essential to the validity of a deed, as all the cases agree. A careful consideration of the facts disclosed by this record, as to the intent and understanding of Robert Williams with reference to the paper averred by the bill to be his deed, has convinced us that it was never delivered as such. It is certain that he had it drawn and signed it, and acknowledged it before a justice of the peace, who certified such acknowledgment; but it is equally certain that he did not then deliver it or intend that it should then become operative. According to the testimony of E. P. Williams, as to the declaration made by Robert Williams on handing him the package containing the deed, it is manifest that he contemplated the taking effect of the deed mentioned after his death. The separate slip of paper signed by Robert Williams and placed within the folded paper alleged to be a deed, is without any indication of the purpose of the maker, as to when the instrument should take effect as his deed. If he had designed it to take effect, it was easy to accomplish that design by delivering the instrument. That he did not deliver it, to take effect presently, shows that he did not so desire it. The separate slip did not constitute delivery, and was unnecessary, if delivery was made. It indicates that the making and acknowledging the instrument was precautionary; that the maker then intended to make the disposition of his property indicated by the instrument he subscribed, and that he did not intend it to take effect immediately, but at some time in the future, when he should see proper, and therefore he retained control of the instrument."

In *Hussey v. Hussey*, 85 Mo. 689, a father having already given land to each of his other sons, executed and acknowledged an instrument conveying a tract to defendant by way of gift, and with defendant's knowledge deposited and kept it with his other papers in a chest to which defendant, who lived with him, had access. The father declared that his intention was that defendant should

Fain v. Smith.

have the deed and the land after his death, and that the deed should not be recorded until then, since he might have occasion to make a change. After his father's death defendant took the deed and had it recorded. *Held*, that the declarations of the father could not give a testamentary character to the instrument, and that it could not take effect as a deed for want of delivery. The court said: "It is quite clear from the testimony, that Enoch Huey executed the conveyance in question, with the purpose of thereby conferring upon his son, at some time, the title to the land described in said deed, and it is equally clear that this was communicated by him to the son, and that the time fixed upon in the mind of the father for so vesting the title, was at or after his own death. Now, it is evident that in order to effectuate this purpose, something more was necessary than the mere execution of the deed, and the lodgment thereof in a place to which the son had access during his life, and from which he could, without hindrance, transfer it to his own possession after his death. Delivery is essential to make a deed effective, and this delivery must be in the life-time of the grantor. *Jackson v. Leek*, 12 Wend. 107; *Jackson v. Phipps*, 12 Johns. 421. That is, there must be an actual or constructive delivery during the life of the grantor, or a delivery after his death which takes effect by relation at some period during his life. A delivery after the death of the grantor, must of course be made by some person holding the deed as a trustee, or having the same in possession as an escrow. *Wheelwright v. Wheelwright*, 2 Mass. 447. The *Butler and Baker's case*, 3 Rep. 850, may be appropriately cited as illustrating the effect of such a delivery. It was there said: 'That to some intent, the second delivery hath relation to the first delivery, and to some not, and yet in truth the second delivery hath all its force by the first delivery; and the second is but an execution and consummation of the first; and therefore, in case of necessity, *et ut res magis valeat quam pereat*, it shall have relation by fiction to be his deed *ab initio*, by force of the first delivery; and therefore, if at the time of the first delivery, the lessor be a *feme sole*, and before the second delivery she takes husband; or if before the second delivery she dies, in that case if the second delivery should not have relation to this intent, to make it the deed of the lessor *ab initio*, but only from the second delivery, the deed in both cases would be void; and therefore in such cases for necessity and *ut res magis valeat*, to this intent by fiction of law it shall be a deed *ab initio*, and yet in truth it was not his deed till the second delivery.'

"As to the constituent and essential elements of a delivery, as applied to deeds, the authorities are numerous, and in some degree, conflicting. In *Jackson v. Phipps*, 12 Johns. 421, Judge SPENCER said: 'It is requisite, in every well-made deed, that there be a delivery of it. This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing; or it may be both; but by one or both of these it must be made; for otherwise, though it be never so well sealed and written, yet is the deed of no force.' It is laid down in Greenleaf's Evidence, vol. 2, § 297, that 'the delivery of a deed is complete when the grantor or obligor has parted with his dominion over it, with intent that it shall pass to the grantee or obligee, provided, the latter assents to it either by himself or by his agent.' The concluding paragraph in relation to the assent of the grantee is unimportant

in the present case, as we are considering only what is required on the part of the grantor. Besides, the assent of the grantee is always presumed, where the instrument is beneficial to him.

"In the case of *Cook v. Brown*, 84 N. H. 460-476, it was said: 'There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depository, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. The depository must have had such a dominion over the deed during the life-time of the grantor, as the latter could not interfere with, in order to have any control over it after his decease.' These and other authorities to the same effect, which it is unnecessary to cite, concur in declaring that the only infallible test of a delivery is the fact the grantor has divested himself of all dominion and control over the conveyance.

"In the case of *Doe dem. Ganons v. Knight*, 5 Barn. & Cress. 671, in an elaborate opinion by BAILEY, J., the doctrine was maintained, that where there has been a formal delivery by apt words, it is not essential, in order to make such delivery operative, that the grantor should part with the custody of the conveyance. In the case of *Belden v. Carter*, 4 Day, 66, it appeared that A. having signed, sealed and acknowledged a deed, conveying a tract of land to B., took up the deed in the absence of B., and said to C., 'take this deed and keep it. If I never call for it, deliver to B. after my death; if I call for it deliver it up to me.' C. took the deed; A. died soon afterward, having never called for it, and C. delivered it over to B. It was held that this was the deed of A. presently; that C. held it as trustee for B.; that the title became consummate in B. by the death of A., and that the deed took effect by relation from the time of the first delivery. The diversity of opinion existing upon the point under consideration is sufficiently presented by the foregoing cases, and it remains to be seen, whether in the present case a delivery of the conveyance in question can be maintained upon the principles announced in any one of them. The facts, it will be seen, are wholly dissimilar. In the present case, no delivery was made by any person pretending to act for the grantor after his death, and a testamentary character could not be given to the conveyance by any declaration made by the grantor, at or after the time of its execution.

"Was there any delivery in his life-time? We think it clear from the testimony that Enoch Huey, after executing and acknowledging the conveyance, kept the same in his custody, until the time of his death, notwithstanding the fact that the son had unrestricted access to the place where it was deposited. On the authority of some of the foregoing cases, this would not be inconsistent with a delivery by apt words during his life, or obstruct the operation of such delivery. But there is no evidence of any verbal delivery. He not only retained the deed in his custody, but he never relinquished his right to alter or annul it. The retention of this power over the conveyance is inconsistent with the verbal delivery. He said to one witness that he withheld the delivery, because change of circumstances might make it prudent and desirable to alter

Fain v. Smith.

the disposition thereby made of his property. After a most careful consideration of the testimony, we find ourselves unable to escape the conclusion that it was the purpose and intent of the father that the son should acquire no rights whatever under the conveyance made to him, until after the father's death. And the statement made to the son by the father, that he might have the deed recorded after his death, cannot be construed to be a present verbal delivery, but viewed in connection with other statements made by him, would seem to have been prompted by the supposition that if the deed should remain intact, and be found among his papers after his death, the son, as grantee therein, would be authorized to have it recorded, and to claim the title to the property therein described. In short, it would seem that the father labored under the impression that he could make this deed perform the office of a will. No construction which can be legitimately placed upon the acts done and the things said by the father, will enable us to give effect to the purpose which he obviously had in view, and the son must abide the consequences of the father's evident want of knowledge of the existing state of the law."

In *Chine v. Jones*, 111 Ill. 563, a father having previously made gifts of property to all of his children except a daughter, went before a justice of the peace and executed a deed of conveyance of a tract of land to her, and acknowledged the same, stating that it would make all his children equal; but he retained the deed in his possession, with no present intention it should take immediate effect, but to be operative only at his death, or on the daughter moving upon and occupying the property, which she never did. It was held, after his death, that the deed never took effect, and that the land therein described passed to his heirs, generally.

The court said "There is no doubt that the law makes stronger presumptions in favor of the delivery of deeds in case of voluntary settlements than in ordinary cases of bargain and sale, as has been frequently recognized by this court. *Bryan v. Wash*, 2 Gilm. 557; *Reed v. Douthitt*, 69 Ill. 348; *Walker v. Walker*, 43 Ill. 311. And we think the authorities establish that an instrument may be good as a voluntary settlement though it be retained by the grantor in his possession until his death. *Southerby v. Arden*, 1 Johns. Ch. 240, *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Schrugham v. Wood*, 15 Wend. 545; *Perry Trusts*, § 103, and our own cases above cited, and *Otis v. Beckwith*, 49 Ill. 121. Yet the cases in this respect are generally attended with the qualification that there be no circumstances, besides the mere fact of retaining the instrument, to show that the executing party did not intend it to operate immediately, or to denote an intention contrary to that appearing upon the face of the deed. Thus, in *Southerby v. Arden*, Chancellor KENT says: 'A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted nor intended to part with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, besides the mere fact of his retaining it, to show that it was not intended to be absolute.' And in *Bunn v. Winthrop*: 'The instrument is good as a voluntary settlement, though retained by the grantor in his possession until his death. There was no act of his, either at the time or subsequent to the execution of the deed,

which denoted an intention contrary to that appearing upon the face of the deed.' And in *Schrugham v. Wood*, there is this quotation from *Garners v. Knight*, 5 Barn. & Cross. 671: 'Where a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential.' Mr. Lewin, in his work on Trusts, in treating of the formalities required to create a trust, on page 123 remarks: 'A wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution.' And on page 124, top, he quotes this observation of BULLER, J., in *Habergham v. Vincent*, 2 Ves. Jr. 'A deed must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death.' The author then proceeds: 'We may therefore safely assume as an established rule, that if the intended disposition be of a testamentary character, and not to take effect in the testator's life-time, but ambulatory until his death, such disposition is inoperative, unless it be declared in writing in strict conformity with the statute enactments regulating devises and bequests.'

"In the case in hand there is that which denotes an intention contrary to that appearing upon the face of the deed, which shows that the deed was not intended to be absolute,—that the grantor in it did not intend it to operate immediately,—and that is, his declaration that the land was to be Mrs. Jones' at his death, but that if she would go and live upon it, it should be hers then, and the other circumstances corroborative of such intention. The deed by its purport was absolute, conveying the grantor's entire interest, to operate immediately. But the evidence shows the deed was not intended to be absolute, but to be qualified in its effect,—that it was not intended to convey the grantor's whole interest, but that he meant to have a life-estate unless the grantee should move upon the land, which she never did; that the deed was not intended to operate presently, but only upon the grantor's death, or going upon the land to reside. The evidence shows the distinct intention not to create a present estate in the grantee. As then there was never any actual delivery of the deed, but the grantor ever kept it in his own possession, and as it never was his intention that the deed should presently take effect and become operative according to its terms, there was no delivery of the instrument as the deed of the grantor, and it was not valid as a deed. As Mrs. Jones never moved on the land, this made the deed one to take effect at the grantor's death, which was a disposition of property of a testamentary character, and invalid because not in compliance with the statute of wills." Citing *Byars v. Sponcer*, 101 Ill. 429; *Buskitt v. Hassell*, 107 U. S. 602.

SCOTT and WALKER, JJ., dissented, the former observing: "Undoubtedly the general rule is, a deed takes effect from its delivery and acceptance, and most generally they are mutual and concurrent acts. It would

Fain v. Smith.

be stating the rule broader than the law will warrant, to say no deed would take effect unless delivered into the actual possession of the grantee. The books abound in exceptional cases. Where the exception to the general rule is most frequently recognized, is in cases of voluntary settlements, as is the conveyance in this case. In such cases a common rule of the law of general application is, the 'first deed and the last will' shall stand. A will is most generally retained by the testator, and so a deed making a voluntary settlement may be retained by the grantor, and still take effect. On this subject Chancellor KENT, in *Southerby v. Arden*, 1 Johns. Ch. 240, states the law to be in cases of voluntary settlements where the grantor retains the deed, the weight of authority is decidedly in favor of its validity, unless there were other circumstances, besides the mere fact of his retaining it, to show it was not intended to be absolute. In *Bunn v. Winthrop*, 1 Johns Ch. 336, the chancellor said: 'The instrument is good as a voluntary settlement, though retained by the grantor until his death.' Both of these cases were cited with approval in *Bryan v. Wash*, 2 Gilman 557. In *Walker v. Walker*, 42 Ill. 311, this court, in discussing the same subject, said: 'No formal delivery to the grantee in person was necessary. If the grantor in a deed intends, when executing it, to be understood as delivering it, that is sufficient. The intention of the party is the controlling element, as said in *Masterson v. Cheek*, 23 Ill. 76.' English and other American cases have been examined, and it is seen they are in harmony with the general doctrine here stated, and it will not be necessary to do more than to cite a few of the most important cases that are considered as supporting the rule: *Nulrod v. Gilham*, 1 P. Wms. 577; *Cotton v. King*, 2 P. Wms. 358; *Clavering v. Clavering*, 2 Vern. 478; *Broughton v. Broughton*, 1 Atk. 635; *Johnson v. Smith*, 1 Ves. 314; *Wall v. Wall*, 30 Miss. 91; *Newton v. Bealer*, 41 Iowa, 334; *Mitchell v. Bryan*, 3 Ohio St. 377; *Otis v. Beckwith*, 49 Ill. 121; *Langham v. Wood*, 15 Wend. 545; *Jones v. Jones*, 6 Conn. 111; *Crawford v. Bertholf*, Saxton (N. J.) Ch. 458; *Doe v. Knight*, 5 Barn. & Cress. 671. It would be useless to go over these cases again, since they have been fully considered by the courts in this country and in England, and with a uniform concurrence in the doctrine stated.

"A principle running through many of the cases on this subject is, the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements than in ordinary cases of bargain and sale. It is for the reason the parties are supposed to place great confidence in each other. It was so expressly held in *Walker v. Walker*, *supra*. In the former class of cases, (that is, cases of voluntary settlements), the intention of the grantor is most generally allowed to control, and the deed will be regarded as taking effect, or not, according to the intention of the grantor. It has been seen, in the present case the intention the deed should take effect was never revoked by the grantor in his life-time. His oft repeated wish was, it should take effect and pass the title to his daughter absolutely. The facts of this case bring it clearly within the rule deducible from the cases *ut supra*. It will also be observed the case being considered has one feature not found in many of the cases on this subject, that makes it a stronger case for the application of the rule. Here the grantee was notified of the making of the deed by the grantor himself, and she

accepted the grant by expressing her obligations for the bounty bestowed upon her, and would try to take care of it. Words of similar import, in *Kingsbury v. Burnside*, 53 Ill. 310, were held to constitute an acceptance of the deed by the grantee, though the grantee died before taking it into actual possession. The reason for the decision in such cases is, assent is the principal element, and the taking of the deed into possession is not indispensable, but is only evidence of assent and acceptance. There being a clear intention manifested by the grantor in making the deed that it should take effect at once, and that she should have the possession of the land on his death, or sooner if she would live on the premises, which intention was never revoked, and there having been an acceptance of the deed by the grantee in the life-time of the grantor, it would seem to follow, on principle as well as upon authority, the deed was effectual to pass the title to the grantee, although the grantor retained possession of the deed until his death. That he retained the deed for the benefit of the grantee sufficiently appears from the facts and the circumstances of the case."

SCHNEIDER V. HAAS.

(14 Oreg. 174.)

Witnesses — parties — exclusion from court room.

A statute providing that during a trial the judge may exclude from the court room any witness of the adverse party not at the time under examination, does not authorize the exclusion of a party to the cause.

ACTION on promissory note. The head-note states the point. The plaintiff had judgment below.

W. Scott Beebe and *Geo. W. Yocum*, for appellants.

Frank V. Drake, for respondent.

STRAHAN, J. This is an action founded on a promissory note. There was an issue of fact formed by the pleadings, and a jury impanelled to try the same. The bill of exceptions shows that at this point, the court, on the application of the plaintiff's attorney, made an order excluding from the court room all of the witnesses of both plaintiff and defendants, during the examination of the witnesses and taking of the evidence; that at that time the plaintiff and both of the defendants were present in court, and the court inquired if both the defendants would testify, and being informed by the defendants' counsel that they would, ordered that one of

Schneider v. Haas.

them be excluded under the order, and that the other could remain, and that defendants' counsel could elect which defendant would be present during the trial. Counsel for the defendants declined to elect, but suggested to the court that the defendant J. Haas knew more about the facts than his co-defendant. The court then ordered that the defendant S. E. Haas be excluded from the court room during the taking of the evidence on both sides; to which ruling and action of the court the defendants objected, but the objection was overruled, and the defendants excepted.

It further appears from the bill of exceptions, that at said time neither of the said defendants was guilty of any contempt of court; but that their conduct was in every way exemplary, and there was no reason for the exclusion of the defendant S. E. Haas, except that she was expected to testify upon the trial of the action. And this ruling of the court presents the only question in the record for our consideration.

The provision of law under which the court made the order in question is as follows: "Section 821. If either party require it, the judge may exclude from the court room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses." Civ. Code, p. 273, § 821. Does this section authorize the exclusion from the court room of a party to a suit, during the time the witnesses of the adverse party are testifying, at any time during the trial of his cause? It seems to me that it does not. The very right to prosecute a suit in court, and to appear therein as a party, carries with it, as a necessary incident, the further right to be present during the trial; and since parties are rendered competent to testify as witnesses if necessary, and the like right attaches to a defendant who is summoned into court to answer the complaint of his adversary — the rights of both parties are equal in this respect. This is a right that the parties may and do waive, by omitting or neglecting to attend upon the sitting of the court at the proper time; but they cannot be deprived of it by the court against their will, when they are present, endeavoring to maintain it.

In *Tift v. Jones*, 52 Ga. 538, the Supreme Court of that State considered the question. In that State the statute provided, that "In all cases either party has the right to have the witnesses of the other examined out of hearing of each other. The court will take proper care to effect this object as far as practicable and convenient,

but any irregularity shall not exclude the witnesses." The court said, "When the court under the provision of law directs a separate examination of the witnesses, and the party intends to be a witness for himself, it would be a proper rule that such party should be first examined — unless there be reasons to the contrary — in the absence of his other witnesses. This would preserve his right to be present in the court during the whole trial of his case. His testimony might be with reference to some point, or of such character, that it would not be fairly intelligible to the jury unless other evidence with which it was connected had been heard." This authority recognizes the right of a party to be present in the court during the whole trial of his case.

In *Crowe v. Peters*, 63 Mo. 429, the right of a party to be present in court during the trial of his case is maintained. The facts and rulings are as follows: "Upon trial, a young woman who was the niece of the defendant was upon examination as a witness for plaintiff, and in the course of her examination was asked some questions in relation to the condition she found Erb in when she visited the defendant about three weeks before he died; and her answer not being satisfactory to the plaintiff's counsel, it was suggested to the court that she was intimidated by the looks and gestures of the defendant, and therefore the court was requested to order the defendant to leave the room until her examination was ended. This request was granted, and the defendant ordered to leave the room, which he did. Exceptions were taken to this order and this is one of the points insisted on here. The defendant had the right to be present at the examination of witnesses against him." And the court adds: "The defendant could not very well suggest explanations to be elicited by cross-examination, unless allowed to be present at the examination in chief."

Larus v. Russell, 26 Ind. 386, is a case very much like the one before the court. The trial court there ruled that the plaintiff should go out of the court room and remain out until he was examined as a rebutting witness. Touching this ruling the Supreme Court of that State remarked: "This proceeding is probably without a precedent. The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and it is so obviously necessary to the security of private rights, that the refusal to entertain the cause at all would scarcely be a greater error than the de-

 Portland and Willamette Valley Railroad Company v City of Portland.

nial of the privilege. Besides it is secured by plain and positive statute." *Couch v. Ryan*, 66 Ala. 244, announce the same rule. *Chester v. Brown*, 55 Cal. 46. Our attention has not been called to any satisfactory authority holding the other way.

Ordinarily the trial court is the better judge of what is necessary to the proper trial of a cause pending before it, than this court. The facts must be there developed in such manner as to insure, as far as possible, the complete administration of justice; and it is only where some right of a party is denied, that we would feel disposed to interfere. The court which tries a cause must in the nature of things be vested with a large discretion over the parties, their attorneys and the witnesses, and the orderly conduct of the trial requires this; but it does not extend to the exclusion of a party from the court room during the trial of his cause.

Watts v. Holland, 56 Tex. 54, has been cited by the respondent. That case does not go to the extent of authorizing the exclusion of a party; it is confined entirely to the power of the court over the witnesses during the trial — a doctrine to which we readily accede.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All concur.

Judgment reversed and cause remanded.

 PORTLAND AND WILLAMETTE VALLEY RAILROAD COMPANY V.
CITY OF PORTLAND.

(14 Oreg. 128.)

Eminent domain — levee — railroad station.

lands in a city bordering upon water and dedicated as a public levee, or landing, may be condemned by legislative authority for the use of a railroad company, subject to the restriction that it shall not charge wharfage.

ACTION to condemn lands. The opinion states the case.

C. & J. McDougall and *J. M. Bower*, for appellant.

A. H. Tanner, for respondent.

LORD, C. J. This action was brought under an act of the legislative assembly to condemn and appropriate what is known as the

Portland and Willamette Valley Railroad Company v. City of Portland.

public levee, in the city of Portland, to the use of the plaintiff, for the purposes therein stated. Session Laws, 1885, p. 100. It appears from the act that originally the piece of land in dispute was dedicated to the public use as a levee or public landing by Stephen Coffin, who subsequently, by deeds in 1865 and 1871, which were duly recorded, conveyed the same to the city of Portland. What right or estate remaining in Coffin after the dedication was intended to be conveyed by these deeds, is not disclosed by the act or this record. It was assumed however in the argument and in the brief, that the city held the levee tract in trust for the use of the public as a levee or public landing. The act itself is justly deserving of the criticism to which Mr. Justice DEADY subjected it. As he said, "It is largely a mass of senseless and redundant verbiage," and this applies directly and forcibly to all that part of the act devolving upon us to consider. See *Coffin v. City of Portland*, 27 Fed. Rep. 418. Among other things, the levee tract is granted to the plaintiff by the act, "to be held, used and enjoyed for occupation by track, side track, water stations, depot buildings, wharves, warehouses, and such other buildings and erections, of such form and manner of construction as may be found requisite, necessary or convenient, in receiving, shipping and storing of produce, goods, wares, merchandise, and generally all kinds of freights, and for use generally, and in the manner usual and ordinary for depot purposes; and as such to be under the exclusive management and control of the owners of said railroad," etc., and with power to sell the same "as appurtenant to said railway," etc., and that "said company shall never charge dockage to any boat, ship or vessel. while actively engaged in receiving or discharging cargo at the wharf which may be erected on said premises," etc.

It would not be difficult to give this language a construction so as to effect a purpose which the legislature could not authorize. But it does not follow that the act is void because something might possibly be attempted under it, and seem to be covered by it, in consequence of the broad language used, which the legislature could not give a legal right to do. It is our duty, if the act will admit of a construction which will justify it, to sustain it. The intendments in favor of the validity of an act of the legislature must prevail, until its provisions are necessarily void. The main purpose and purport of the act was succinctly stated by Mr. Justice DEADY, in *Coffin v. City of Portland*, *supra*, in which he said that

Portland and Willamette Valley Railroad Company v. City of Portland.

the act was "a grant or license to the Portland & Willamette Valley Railroad Company, then and now engaged in constructing a road between Portland and Dundee of the use of the levee for a depot, and the wharves and warehouses necessary and convenient for receiving, storing and shipping freight, on condition, among others, that said company shall not charge any vessel for 'dockage,' while receiving or discharging cargo at any wharf on the premises."

It is contended principally (1) that the act is void in authorizing the plaintiff to do what the legislature is without power to authorize; and (2) that it is void, because the use to which the act devotes the property, or authorizes the plaintiff to devote it is inconsistent with the use to which it is already dedicated. The plenary power of the legislature over public corporations, except as to vested rights of property, and of creditors, is indubitably established. *Dartmouth College* case, 4 Wheat. 519. "Municipal corporations," said DILLON, C. J., "owe their origin to, and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all the municipal corporations in the State, and the corporations could not prevent it. We know of no limitation on this right, so far as the corporations themselves are concerned. They are, so to phrase it, mere tenants at will of the legislature." *City of Clinton v. Cedar Rapids and Miss. R. Co.*, 24 Iowa, 456. But while the municipality exists, as to private property which it may have been allowed to acquire under its charter, such property is doubtless as much protected by the Constitution as the private property of the citizen. Nor can the legislature deprive the city of such property, except it be for public use, and only then upon just compensation. But the easement or property which the city has in public streets or public places is of a different character. It is not private property of the city, nor can the city sell or use it for other than proper public purposes. The city might sell the market house, or appropriate it to some other municipal use; but it cannot sell its streets, nor use them for other than the legitimate purposes connected with such use. Over these, all streets and highways, and public places and their uses, the plenary power of the legislature, in the

Portland and Willamette Valley Railroad Company v. City of Portland.

absence of special restrictions, has been often asserted in several leading cases. In *Commonwealth v. Erie & Northeast R. Co.*, 27 Penn. St. 354, BLACK, C. J., said: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. It has been settled, not only in England (*King v. Pease*, 1 Barn. & Ald. 30), but in Massachusetts (*Newburyport Turnpike Corp. v. East. R. Co.*, 23 Pick. 328), New York (*Drake v. Hudson River R. Co.*, 7 Barb. 509) and in Pennsylvania (*Philadelphia v. T. R. Co.*, 6 Whart. 43). If such conversion of a street to purposes for which it was not originally designed does operate severely on a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

The interest in the use of streets and highways and public places and their uses, being *publici juris*, the power of regulating such use is in the legislature, as the representative of the whole people. It is a part of the political or governmental power of the State, in no way held in subordination to the municipal corporation. It has therefore been held in many cases that the legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power, or devolve it upon municipal authorities. *Moses v. Ry. Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; *Mercer v. Ry. Co.*, 36 Penn. St. 99; *Springfield v. R. Co.*, 4 Cush. 63; *People v. Kerr*, 27 N. Y. 188; *Lackland v. R. Co.*, 31 Mo. 180; *City of Clinton v. R. Co.*, *supra*.

The decisions however are not entirely harmonious, where the public have only an easement in the street or highway; and in some of the cases it has been held, as against the proprietor of the soil, the use of the street or highway for the purposes of a railroad created an additional burden or servitude, which under the Constitution he could not be deprived of without compensation. *Ford v. Chicago and N. W. R. Co.*, 14 Wis. 616; *Pomeroy v. Chicago and N. W. R. Co.*, 16 Wis. 640; *Gray v. St. Paul and P. R. Co.*, 13 Minn. 315; *Williams v. Natural Bridge P. R. Co.*, 21 Mo. 580. And this, Judge Cooley says, appears to be the weight of authority. Cooley Const. Lim. 549. But where the fee of the streets is in the city corporation, and not in the adjoining owner, a different rule

Portland and Willamette Valley Railroad Company v. City of Portland.

has been applied. *Moses v. Pittsburg, Ft. W. & C. R. Co.*, 21 Ill. 516; *Protsman v. I. & C. R. Co.*, 9 Ind. 467; *People v. Kerr, supra*; *Clinton v. C. R. & M. R. Co., supra*; *Lexington & Or. Co. v. Applegate*, 8 Dana, 289. See also Cooley Const. Lim. 555, and notes.

It may be — it is not necessary for us to decide the question — that private citizens owning adjoining property may have rights or estate in or to the use of streets or public places over which the power of the legislature is not supreme or plenary. Whatever their rights may be, we are not required to consider upon this record. They are not parties, and their interest cannot be affected by this proceeding. All that we are required to consider is, the rights of the defendant, a municipal corporation; and as we have seen, these rights the defendant holds subject to the supreme will of the legislature, as the representative of the people; and that so far as regards the defendant, its streets and public places, and their uses, are not the private property of the municipality, in the sense that the legislature cannot authorize the same to be used for a public purpose unless it makes compensation to the city for such use. In *People v. Kerr, supra*, EMOTT, J., said: "The title (in the streets) thus vested in the city of New York is as directly under the power and control of the legislature, for any public purpose, as any property held directly by the State or any public body or officers; and its application cannot be challenged by a corporation (the city) which in respect to such property at least is a mere agent of the sovereign power of the people." And in concurring, WRIGHT, J., said "I am clearly of the opinion that the city corporation has no property in the streets, of a character to be protected by the constitutional limitation on the right of eminent domain."

The principle deducible from these authorities is, that when property is acquired by the exercise of the right of eminent domain, on payment of its value from the public funds, or by dedication under a statute, where the fee to the soil passes out of the dedicatory over the use of such property, so far the municipal corporation is concerned, the legislature possesses unlimited control. It is immaterial whether the fee of the street is in the public, or in the city in trust for the public; as then the city would not hold the fee for itself or its inhabitants only, but for the public generally, including its own inhabitants; the power of the legislature to authorize the use of the same by a railroad, without the consent of

Portland and Willamette Valley Railroad Company v. City of Portland.

the city, and without compensation to it, is undeniable. The reason is plain. The streets are not the private property of the corporation. It owns no property in them, in the sense of a character to be protected by the constitutional limitation on the right of eminent domain. It results as a consequence of the unlimited power of the legislature, in the absence of special restrictions, not only over the existence of the municipality, but while it allows it to exist, over its streets and public places held for the use and benefit of the general public. By analogy, these principles of the law are alike applicable to other property held by the city for the general public, such as levees or public landings. Unless there is something in the particular facts and circumstances to take such property, devoted to public use, out of these general principles, it will be governed and controlled by them.

In the case now in hand, the levee was unconditionally dedicated to the public use as a public landing. When this was done, there remained in the dedicator the legal title, to which, so to speak, was attached and vested in him every right of use or of property not inconsistent with the use he had given to the public. In a word, it may be used for the use to which he dedicated the property, viz., as a levee or public landing. Any other use inconsistent with that use belonged to him. To this property, thus dedicated to the public use, the dominion of the legislature attached, but its power over it is not supreme; it might regulate its use or promote its improvement, but it could not divert or subject it to any use clearly inconsistent with the purposes of its dedication. To do that would violate the contract of dedication, and any person interested would be authorized to institute proper proceedings to enjoin it. Nor is it perceived that, so far as regards the defendant corporation, the holding of the title by it in trust for the use of the general public, as a levee or public landing, makes any difference. The corporation holds only in trust—in subordination to the contract of dedication—for the use of the general public as a levee or public landing. The city does not own it, nor can it sell or dispose of it, or divert it to any private use. Such a title is a holding for a public use—is public property, to be used in subordination to the use for which it is dedicated—and is not private or municipal property. To this extent then it may be said that whatever interest or estate the city may hold in the levee is essentially and wholly public, and not private property, and that the

Portland and Willamette Valley Railroad Company v. City of Portland.

city in holding it is the agent or trustee for the public, and not a private owner for profit. It is a title conferred on it by the dedication for the benefit of the public to the uses granted, and not of private ownership, which comes within the constitutional limitation on the right of eminent domain. It results that the legislature may regulate its use, or devolve it upon the defendant or the plaintiff as its agent, in conformity with the purposes of the dedication, without the consent of the city and without compensation to it. The legislature may therefore authorize the doing of the things by the plaintiff prescribed by the act, within the limitations indicated. It cannot itself do, or authorize the defendant or plaintiff, nor can either of them do, any thing to divert or subvert the use to which the levee is already dedicated. The things to be done under the act must be consistent with the use of the levee as a public landing, and it is only in this sense that the act can be upheld.

Are the things authorized to be done under the act clearly inconsistent with the use of the levee as a public landing? As we have construed the act, it only in effect purports to grant to the defendant—to adopt the language of Mr. Justice DEADY—“The right to improve and use the premises as a public landing, with the added facility of direct and immediate railway connection therewith.” Now will not the construction of wharves and warehouses, at which vessels may load and discharge cargo, be rather an improvement of its use as a levee or public landing, than its subversion as such? Are not these things in fact necessary and essential to afford proper facilities to the public, and make the levee of any value and benefit as a public landing? Are they not in accord with the general purposes for which the property was dedicated? Do they not in fact contribute to give it more identity as a public landing, and render the use it was dedicated to serve more beneficial to the general public?

Nor does the construction of a depot thereat, in connection with the railway, subvert or destroy its use as a public landing, nor is it inconsistent therewith; but within proper limitations, it may tend to improve and make the use of the levee, as such, more beneficial. “A landing is a place on a river, or other navigable water, for lading and unlading goods, or for the reception and delivery of passengers.” *State v. Randall*, 1 Strob. 111. “It is either the bank or the wharf, to or from which persons or things may go from or to some vessel in the contiguous waters.” *State v. Graham*, 15

Portland and Willamette Valley Railroad Company v. City of Portland.

Rich. 310; see also *Coffin v. City of Portland, supra*. Now are not all these things, and may they not be so constructed — wharf, warehouse and depot — as proper incidents to a public landing, which improve and facilitate its use, extend its benefits to a larger public, and make it more suitable for the accommodation of passengers, and the stowing and shipping of general freight? The legislature, as the representative of the general public, has the right to regulate its use and improve the same, consistent with the purposes of its dedication; and it may do this directly, or authorize the defendant to do it as agent of the State. If then these structures may be built to improve the landing, and make its use more beneficial to the general public, and are not inconsistent with the use to which the levee was dedicated, what right in this property of the city, as trustee, is affected, which entitles it to compensation, or to be protected by the constitutional limitation on the right of eminent domain? As Mr. Justice DEADY said: "As Portland has no 'pecuniary' or other right in this property, except as trustee, and then only so far as the legislature may provide or permit, it is not apparent what claim it can have for damages, in consequence of the appropriation to such uses and purposes." But my associates, while not disagreeing as to this result on the theory of condemnation, suggest and think that it was the intention of the legislature, by the act, to indemnify the city for any improvements, money expended on the levee, paid out on same, or interest acquired by the deeds, (which is not disclosed by this record) as damages; and that the proceeding, although in the form of condemnation, is for this purpose; and that in such case the State has a right to prescribe such conditions, although, without manifest intention to indemnify, the result would be otherwise. The judgment must be reversed, and the cause remanded for further proceedings.

Selby v. City of Portland.

SELBY V. CITY OF PORTLAND.

(14 Oreg. 242.)

Office and officer — liability of officer de facto to officer de jure for salary.

A city policeman, wrongfully removed from office, may not recover from the city his salary paid to his successor, until after an adjudication establishing his right.*

ACTION for salary. The opinion states the case. The defendant had judgment below.

Yocum & Beebe and R. Williams, for appellant.

A. H. Tanner, for respondent.

THAYER, J. The appellant commenced an action in the Circuit Court of Multnomah county against the respondent, to recover an amount of salary alleged to be due him as a police officer of said city, and for the salaries of some five other policemen, which had been assigned to him. The appellant and the assignors referred to had been regularly appointed chief of police of said city, captain, and ordinary policemen thereof; and each served in that capacity during a period of time. While they were so serving, the mayor of the city attempted to displace them, and appoint other policemen in their places, and as they claim, unlawfully prevented them from performing their duties as such policemen; and the action was brought to recover their respective salaries after being so displaced, and until the time of the commencement of the action. It appears that the appellant was displaced March 18, 1885; his assignor, J. H. Lappeus, chief of police at the time, was displaced July 22, 1883, his assignor, T. P. Luther, captain of police at the time, was displaced August 2, 1883, and his assignors D. W. Dobbins, J. E. Cramer and A. Johnson, regular policemen at the time, were each and all displaced March 18, 1885. The amount of all their salaries during the time claimed for aggregates \$15,625.

The respondent interposed the following matters of defense to the complaint: That the salaries sued for were paid to parties other than the appellant and his assignors, without any knowledge on its

* See *Stuhr v. Curran* (15 Vroom, 181), 43 Am. Rep. 353.

part that they claimed the offices or the salaries; that appellant and his assignors were removed from their offices, and acquiesced in the removal; that appellant and their assignors abandoned the said offices, and neglected to perform the duties pertaining thereto; and that the appellant and his assignors were duly dismissed and discharged from their offices.

The city charter in force at the time of these attempted removals provided that the mayor, with the consent of a majority of the common council, might appoint a chief of police, one or more captains of police, and a suitable force of regular policemen; and remove or suspend any member of the police, including the chief and captains, for any cause which they might deem sufficient, to be stated in the order of removal or suspension. Charter, 1884, chap. 8, § 72, and the prior charters of the city.

It was not claimed in the case that the mayor, with or without the consent of the majority of the common council, had removed or suspended the appellant and his assignors beyond this: The mayor had, in certain messages to the common council, announced in each case that he had appointed a person to the same position they held, and generally stated that it was in the place of the one he intended to supersede, and requested the common council to confirm the appointment, which was done by a majority vote thereof in each of the cases. There was no cause stated for the removal, nor any order made in regard to it, unless the mayor's communication can be deemed such order. Upon the trial of the action in the Circuit Court, the judge thereof presiding ruled out all the defenses of the respondent, except that of the abandonment of the offices by the appellant and his assignors. That question the judge permitted to go to the jury, and instructed them that if they found from the evidence that these parties did in fact abandon their offices, they would find for the respondent; whereupon the jury returned a general verdict in favor of the respondent and against the appellant, and upon which the judgment appealed from was entered.

To the instruction referred to the appellant's counsel took an exception, which is the main point relied upon in the case. Whether the instruction was correct or not depends upon the evidence bearing upon the question of such abandonment. The appellant's council claimed that there was no evidence tending to prove an abandonment upon the part of the appellant and his

Selby v. City of Portland.

assignors of the said offices; and I confess that I was very skeptical as to the probability of there being any such evidence. I presume instances have occurred in which officers have abandoned their offices, but they have been so rare that it requires cogent proof to establish them as matters of fact. An officer, doubtless, might legally abandon his office when wrongfully ousted therefrom; his permanent removal from the territorial jurisdiction of the office would necessarily have that effect; but his failure to keep up a clamor for reinstatement could not certainly be urged as evidence of abandonment.

The mayor, with the consent of a majority of the common council, had the appointment of these officers, and could remove or suspend them. He, with the consent of that body, did appoint other persons to supersede them, and they were formally installed and remained in these positions. What therefore could the appellant and his assignors do in the premises, but submit to the action of these officials, or institute legal proceedings to annul their acts? I have read the testimony contained in the bill of exceptions, and do not think it tends to show an acquiescence in the removal, or abandonment of the offices by the appellant and his assignors — do not find that they ever proposed to relinquish them. It appears that the most that can be said in regard to their conduct is, that they did not attempt to contend about going out of their places, or about being let in again. There is certainly nothing to show that they relinquished any right, or did any thing to estop them from claiming the offices. If the mayor and common council had offered to restore them, and they had refused such restoration, there would be grounds upon which to claim an estoppel; but as the case stood, I am unable to discover that there was any such ground.

But the respondent's counsel contends that the mayor and council had the right to remove appellant and his assignors from the offices held by them, without cause stated in the order of removal; that such office belongs to the class provided for in section 2, article 15 of the Constitution of the State, and is to be "held during the pleasure of the authority making the appointment." It is questionable who "the authority making the appointment" is in this case. The authority itself is derived from the legislative department of the State, and the mayor and common council are restricted in the manner of its exercise, and the question is, whose

pleasure is to be consulted, the legislative or mayor and common council? The latter are intrusted with the appointment, but the authority emanates from the former, and it has expressed its pleasure by requiring the mode in question to be pursued when the authority is exercised. The mayor and common council are mere agents in the matter, and I think, beyond question, are subject to any restrictions their principal may deem proper to impose. I cannot see that the authority to remove or suspend policemen could have been exercised without a special cause, which was required to be stated in the order of removal or suspension. The provision is a salutary measure, and should be observed with strictness.

It looks very much to me as though the public confidence was abused in the transaction, and that the appellant and his assignors were shamefully trifled with; but it occurs to my mind that they neglected to take proper steps in the matter, and have lost the remedy they could have invoked successfully. They might have commenced an action in the nature of a *quo warranto* against the persons designated to succeed them, and been reinstated in their positions; or probably they might have sued out a writ of review, obtained a reversal of the action of the mayor and common council in the affair, and been restored to their positions in that way. It was held by the Court of Appeals in New York, in *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; s. c., 55 Am. Rep. 835, where a policeman of that city, who had been duly appointed to that office and entered upon the performance of his duties, was attempted to be removed by the police commissioners, and upon *certiorari*, the order of removal was reversed, and he was restored to his office, that he could recover against the city his salary which accrued between the time of the order of removal and the restoration, and without any abatement on account of earnings realized from his former trade, resumed during the interim. Under that decision, these parties could possibly have recovered their salaries after a successful prosecution of a writ of review. I cannot however believe that they can maintain an action therefor while other parties occupy their places, have qualified as policemen, and are recognized by the city government as such. It seems very evident to me, that their right to the office would have to be judicially determined in a proper proceeding, before such an action could be sustained.

The appellant's counsel have cited a number of authorities to show that an action of the character of the one in question can be

Selby v. City of Portland.

maintained; but not one of them, as I can discover, was in a case where the plaintiff had been put out of office and another person been formally installed, and in the discharge of the duties thereof, unless there had been an adjudication in a direct proceeding declaring him lawfully entitled to it, and the incumbent a usurper.

The appellant's counsel claim that the salary is attached to the office, and does not depend upon contract. It is fixed by law. But it does not follow that the title to the office can be tried in a collateral action. Dillon, in his work on Municipal Corporations (3d ed., § 831), says: "Thus the salary or fees of an officer of a municipal or public corporation may, like other debts, be recovered by an action at law against the corporation. This, ordinarily, is the remedy, and not *mandamus*; but if the officer cannot sue the corporation, he may, where entitled, compel payment by means of this writ, unless another is in possession under color of right, in which case the title to the office cannot ordinarily be determined on *mandamus*, or in a collateral proceeding."

It may be said that the action of the mayor and common council in the premises was a flagrant violation of the law, and of the rights of these officials; but nevertheless other persons were nominated in their places, confirmed by the common council, took the oath, were regularly inducted into their places, and became officers *de facto* in their stead. The title to the office had to be tried, as preliminary to the right of action, which could have been brought in the lowest court of the State having civil jurisdiction. The parties ousted could, as their salaries accrued monthly, have sued therefor in a justice's court, whose jurisdiction to try the title to the office would have to be conceded, the same as that of the Circuit Court, under the same form of action, not only in cases where the question as to the title is a simple one, but where it is complicated and doubtful. Courts will not entertain a case in favor of a party to recover for the use and occupation of real property against one who is in possession thereof adversely, but remit such person to his remedy by ejectment; and I think there would be less reason for entertaining a case of the character of the one in question than in that referred to. To allow an officer in such a case to remain wholly passive for a term of years, and then bring an action and recover the amount of his salary, which had been all the time accumulating, without attempting to dispossess the incumbent, would

result in a pernicious practice, and tend to overturn a well-established rule of law regarding the trial of the right to an office. No precedent for such a course has been furnished.

It has long been a mooted question, whether the payment of a salary, or fees, or emoluments of an office to a *de facto* incumbent would exonerate the government or political body from the payment thereof to the *de jure* officer. Numerous authorities have been cited upon both sides of that question, though it is not before the court as the case stands. Those cited by the respondent's counsel go, in the main, to show that it will not. They maintain that the compensation is attached to the office, and carry it out to its logical sequence by holding that the salary must be paid to the *de jure* officer; while the ones which maintain the contrary doctrine generally concede that the salary is attached to the office — yet hold that the disbursing officer is not compelled to look beyond the certificate of election or appointment of the person who is in the discharge of the duties, and that payment to such party discharges the obligation of the political body in regard to the matter; but neither class of cases sanctions the right of the *de jure* officer to recover the salary while out of possession of the office, until he obtains a determination of a competent tribunal in favor of his title, in a direct proceeding instituted for that purpose.

Dorsey v. Smyth, 38 Cal. 21, one of the cases cited by the respondent's counsel, was an application for a mandate to compel the county auditor of Tuolumne county, California, to audit and allow the salary of the relator as district attorney of said county. He had been kept out of office by an intruder, who held it under color of office. The court granted the writ, but before the application was made, the relator had instituted a contest for the office against the incumbent, and had obtained a decision of the Supreme Court of that State, that he was entitled to it of right.

Douglass v. State, 31 Ind. 429, another of the cases, was a direct proceeding under the statute of the State of Indiana upon the relation of Wright against Douglass, in which the latter was charged with having usurped the office of auditor of Harrison county, in that State. It was to try the title to the office, and recover the fees and emoluments thereof, as incidental to the proceeding.

City of Philadelphia v. Rink, 2 Atl. Rep. 505, another of the cases, was an action brought by Rink against the city to recover his salary as magistrate thereof. One Barr had intruded into the

Selby v. City of Portland.

office and held it for some time under color of office. Rink was allowed to recover for full time, but before the action was commenced, his right to the office had been determined by the Supreme Court of Pennsylvania, in a direct proceeding instituted for that purpose.

Carroll v. Siebenthaler, 27 Cal. 193, another of the cases, was a *mandamus*, upon the relation of Carroll, to compel the board of supervisors of Amador county to allow his salary as supervisor of a district of that county, to which one Ingalls had been declared elected, and for some time had held the office. The writ was allowed, but Carroll had commenced the suit to try the right to the office, and had obtained a decision in his favor, before the *mandamus* proceedings were begun.

People v. Potter, 63 Cal. 127; *Meagher v. County of Storey*, 5 Nev. 244; *Matthews v. Supervisors of Copiah Co.*, 53 Miss. 715; s. c., 24 Am. Rep. 715, and *City of Philadelphia v. Given*, 60 Penn. St. 136, four other of said cases, merely hold that a *de facto* officer cannot recover compensation for services while occupying the office, a point upon which none of the authorities disagree, that I am aware of.

Mayor, etc., of Memphis v. Woodward, 12 Heisk. 499, another of the cases, was a suit by the latter party against the former, to recover a salary as physician to the city hospital, an office created by law for said city. Woodward had been chosen to the office, and the mayor went, in company with him, to Lynch, the former physician, to turn over the office to Woodward. Lynch asked for time in which to arrange his affairs, and it having been granted him, he employed it in suing out injunctions to restrain the mayor and Woodward from interfering with him in the enjoyment of the office. The chancellor perpetuated the injunction, but the Supreme Court of the State dissolved it, and held that Woodward was entitled to the office, and the suit for the salary was not commenced until after that decision was rendered. Under the circumstances, a recovery was had in favor of Woodward for the salary during the time he was deprived of the office.

Mayor, etc., of Macon v. Hays, 25 Ga. 590, another of the cases, was an action to recover compensation as city marshal. That case was tried several times, and will be found reported in 19 Ga. 468, and 21 Ga. 280; and whether it has ever yet been determined or not I am not advised. The right to institute such an action was

succeeded, although the marshal had been removed from the office by the mayor and common council of the city; but he had, before its commencement, obtained a judgment of the Supreme Court of the State quashing their proceedings in the matter.

Dolan v. Mayor, 68 N. Y. 274; s. c., 23 Am. Rep. 168, another of the cases referred to, was an action to recover a salary as assistant clerk of the District Court for the sixth judicial district in the city of New York, and the plaintiff was allowed to recover for a portion of time during which he had been excluded from the office by another party who was holding under color of office, but not for any portion of the time covered by payment to the *de facto* officer; nor was the action to recover the salary commenced until after judgment of ouster was obtained against the incumbent in *quo warranto* proceedings.

Bryan v. Cattell, 15 Iowa, 538, is also cited by the respondent's counsel. That was a proceeding by *mandamus*, to compel the auditor of the State of Iowa to issue to the plaintiff in the proceeding warrants on the State treasurer for the salary of the plaintiff as district attorney for the fifth judicial district of said State, claimed to be due him for the quarter ending the first days of April, July and October, 1862. The plaintiff had been duly elected to said office for the term of four years from the first day of January, 1859; but in July, 1861, he was commissioned a captain in the volunteer service of the United States, for three years, or during the war, was mustered into the service, and so continued until after the *mandamus* proceeding was instituted. The auditor refused to issue the warrants, upon the ground that the plaintiff was absent from the State during the whole period for which he claimed the emoluments of the office; and it was contended that he forfeited his office by engaging in a service incompatible with its duties. The court held that the plaintiff did not, by his enlistment in the service, forfeit his office, and that the salary was attached to it, and allowed the writ. It does not appear that any attempt was made to appoint another person to the office during the plaintiff's absence, or that there was any contest regarding it. The only question the court had to decide in the case was, whether the plaintiff's engagement in the military service, under the circumstances, operated *ipso facto* as a forfeiture of it; and when it was determined that it did not, the court had no alternative but to decide that he was entitled to the salary.

Gee v. McMillan.

None of the cases referred to indicate that an action to recover the salary of an office could be maintained while occupied by a *de facto* officer, until the right to the office has been determined by proper adjudication. Such a determination could not properly be had in this case, as it would determine the rights of parties not before the court. It would be a determination that the incumbents who succeeded the appellant and his assignors were intruders and usurpers, when they were not before the court. Upon this ground, the appellant was not entitled to recover, and the Circuit Court should have dismissed the complaint, instead of trying the case upon the merits. To that extent the judgment appealed from will be modified. Costs will not be allowed to either party upon this appeal.

Judgment modified.

GEE V. McMILLAN.

(14 Oreg. 208.)

Vendor and purchaser — vendor's lien.

On a conveyance of land by deed, a lien arises in equity for the unpaid purchase-money.

ACTION to enforce a grantor's lien. The opinion states the case. The plaintiff had judgment below.

P. L. Willis, for appellant.

M. G. George and *O. P. Mason*, for respondent.

STRAHAN, J. The object of this suit is to enforce a grantor's lien upon certain real property situate in Multnomah county.

[Omitting statement of pleadings and minor questions.]

But the other question is the one mainly relied upon, and it must be admitted, presents the greatest difficulty. The contention of the plaintiff is that the note of \$1,250 described in the complaint is for the residue of the purchase-money for the real property which she conveyed to the two defendants, Sarah McMillan and Mary Haugg, and that as against them she had a lien in equity for said purchase-money. In this case the property was conveyed to the grantees, and therefore, according to some of the authorities,

the lien, if it exists, is called a grantor's lien. 3 Pom. Eq. Jur., § 1249. While other authorities equally respectable seem to ignore this distinction, and to treat the lien as a vendor's lien, where the property has been conveyed; or else it is entirely disregarded. 1 Lead. Cas. Eq., part 1, 481; 2 Story Eq. Jur., § 1217, 1218. Whether the lien be treated as a vendor's lien or as a grantor's lien can make no difference in this case, as the result would be the same. The principle contended for by the respondent is, that where one sells real property to another and conveys the same by deed, a lien arises in equity in favor of the grantor for the purchase-money, or for such part thereof as remains unpaid. I think this proposition rests on principles of equity too strong to be shaken or overthrown without legislative sanction. It is not important whether it will be accounted for as a trust, or as an equitable mortgage, or as arising from natural equity, or as having originated from any of the other causes or reasons stated by the writers on that subject: the result must be the same. In either event it is a principle eminently promotive of justice between man and man, and in my opinion has the sanction of the ablest writers on jurisprudence, as well as the weight of judicial opinion, in its favor. 3 Pom. Eq. Jur., §§ 1249, 1250; 1 Lead. Cas. Eq. 481 and notes; 2 Story Eq. Jur., *supra*; and see 2 Sug. Vendors, 671 and notes.

Mr. Pomeroy's excellent treatise shows that the grantor's lien exists in the following States and Territories: Alabama, Arkansas, California, Colorado, Dakota, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oregon, Tennessee, Texas and Wisconsin. § 1249, *supra*. The States of Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia and West Virginia do not recognize the doctrine. The Supreme Court of the United States recognizes and enforces the lien. Said the court! "When one person has got the estate of another, he ought not in conscience to be allowed to keep it without paying the consideration. It is on this principle that the courts of equity proceed as between vendor and vendee. The purchase-money is treated as a lien on the land sold, where the vendor has taken no separate security." *Chilton v. Braidon*, 2 Black, 458; *Peters v. Bowman*, 98 U. S. 56; *Thredgill v. Pintard*, 12 How. 24.

(See v. McMillan.

The earliest case in this court where a vendor's lien is recognized is *Pease v. Kelly*, 3 Or. 416. The opinion is brief, and was delivered by Boise, J. Speaking of the lien for the unpaid purchase-money, he said: "A mortgage is a more certain and definite security than a vendor's lien. The lien exists if there is no higher security." In the brief of counsel for the appellant in that case, the very grounds upon which this lien appears to have been doubted in this State, in a case presently to be mentioned, were referred to, and must have been considered by the court. It is clear that the reasons there suggested did not prevail, and that the court would have enforced the lien if it had not been waived by the taking of a mortgage. It is difficult to understand how the vendor's lien could be waived by the taking of a mortgage if such lien never had any existence.

The case which seems to throw some doubt upon *Pease v. Kelly*, *supra*, is *Kelly v. Ruble*, 11 Oreg. 75. There it is said: "As the respondent has failed to make out a sale, it becomes unnecessary to consider the case further. We have thus far impliedly admitted the existence of the equitable lien of the vendor of real estate for the unpaid purchase-price. But we doubt the actual existence of the lien in this State. *Ahrend v. Odiorne*, 118 Mass. 261; s. c., 28 Am. Rep. 199; *Kauffelt v. Bower*, 7 S. & R. 64-76. It is not believed that the existence of such a lien was decided in *Pease v. Kelly*, 3 Oreg. 417; having reached the conclusion that no sale had been shown in the case before the court, no question could arise as to a lien for the purchase money." While this intimation by this court is entitled to very great respect and consideration, I do not think, under the facts of the case, it ought to be adopted as controlling authority. In *Coos Bay Wagon Road Co. v. Crocker*, 6 Saw. 574, the United States Circuit Court, district of Oregon, recognized and enforced a vendor's lien. And this court at the present term has recognized and applied the same principle. *Burkhart v. Howard*, 14 Oreg. 39.

It was suggested upon the argument that a grantor's lien did not exist in this case, for the reason that the note mentioned in the complaint was partly for the price of the land and partly for the price of the personal property. But we do not find that any part of the consideration for the personal property entered into said note. The court below found that this note was given as a part of the purchase-price of land, not personal property, and I think the

finding was justified by the evidence. No stronger case could be presented, requiring the application of the equitable doctrine of grantor's lien for purchase-money, than this. Here a most flagrant fraud appears to have been practiced upon some confiding and unsuspecting people, manifestly requiring relief of some kind; and yet, unless it be administered through the application of the law of equitable lien for purchase-money, it seems to me the wrong would have to go unredressed. Of course, the fraud practiced in no manner affects the question of the lien. That exists independently of the fraud. But it does illustrate and make plain the real necessity there is for application of this principle in the practical administration of justice. Let a decree be entered in accordance with this opinion.

THAYER, J. (concurring). The opinion involved in this case depends very much upon the right of the grantor of real property by deed of absolute conveyance, to claim a lien upon the property for the unpaid purchase-price thereof. In *Kelly v. Ruble*, 11 Oreg. 75, this court expressed a doubt as to whether a vendor's lien, as it existed at common law, was in force in this State. It was not necessary to the decision of that case to determine the question, and hence no opinion upon it was declared, further than an intimation of its non-existence. But in a former case, *Pease v. Kelly*, 3 Oreg. 417, this court evidently considered that a lien of that character was in force, although it did not distinctly so determine.

It will not be contended, I presume, but that the common law of England, so far as applicable to the condition of the people, has been adopted in this State, nor be denied that the part thereof relating to vendor's liens was adopted with it, unless unfitted to the situation of the affairs of the community. A great amount of speculation has been indulged in as to the origin of such a lien. Mr. Pomeroy, in his work on Equity Jurisprudence, says "that has been accounted for as a trust, as an equitable mortgage, arising from a natural equity and as a contrivance of the chancellors to evade the unjust rule of the early common law, by which land was free from the claims of simple contract debts." § 1250, Pom. Eq. Jur. Chancellor KENT terms it an equitable mortgage, and says that "it will bind the vendee and his heirs, and volunteers, and all purchasers from the vendee, with notice of the vendor's equity; that *prima facie* the lien exists without any special agreement for that purpose; and it

Gee v. McMillan.

remains with the purchaser to show, that from the circumstances of the case it results that the lien was not intended to be reserved, as by taking other security, etc." 4 Kent Com. *151, 152. Judge Story says "that it attaches to the estate as a trust, equally, whether it be actually conveyed, or only be contracted to be conveyed." Story Eq. Jur., § 1218.

In *Ahrend v. Odiorne*, 118 Mass. 261; s. c., 28 Am. Rep. 199, Judge GRAY, now of the Supreme Court of the United States, then chief justice of the Supreme Court of Massachusetts, concluded, after an elaborate examination of the question, that the foundation of the doctrine was, that justice required that the vendor should be enabled to charge the land in the hands of the vendee as security for the unpaid purchase-money, and that the restriction of it to real estate suggested the inference that the Court of Chancery was induced to interpose, for the reason that real estate could not be attached on mesne process; nor except in certain cases and to a limited extent, be taken in execution for debt. The learned judge rejected the theory of natural equity, because that would apply to a sale of chattels, as well as of land; and the theory of a trust, as that would include too many other cases to which, confessedly, the doctrine had not been extended.

Mr. Pomeroy repudiates the idea of its being a trust, and thinks that the original and true ground of the lien arises out of the natural judicial conception, that upon the sale of any thing on credit, the very identical thing sold should be regarded in some sort as a special fund out of which payment of the price was to be obtained, or at least secured, and that the seller should not be considered as parting absolutely with his whole interest and dominion until the price is fully paid. 3 Pom. Eq. Jur. 256, § 1250. And in a foot-note to said section, that author concludes that the theory advanced by the Massachusetts courts as to the origin of the doctrine was imperfect and unsatisfactory; that the absence of any power at common law to make the land liable for ordinary debts, instead of being the source of the grantor's lien, was itself only another instance and consequence of the same general superiority given to the ownership of the land; both were incidents of one common mode of treating real estate, as compared with personality. But he suggests the opinion that the original grounds and reasons for admitting the grantor's lien do not exist in our own country, and that the lien itself is not in harmony with our general real property law.

Judge Story, on the other hand, says, "that the principle upon which courts of equity have proceeded in establishing the lien in the nature of a trust is, that a person who has gotten the estate of another ought not, in conscience, as between them, be allowed to keep it, and not pay the full consideration money." Story Eq. Jur., § 1219. And in the previous section the same author says: "It has often been objected that the creation of such trust by courts of equity is in contravention of the statute of frauds. But whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by any mere theoretical doubts." Story Eq. Jur., § 1218.

The objection to the doctrine of vendors' liens is not to its application to estates contracted to be conveyed, but to the extension of it to estates actually conveyed. It seems to me that if the doctrine has no other foundation than to evade the rule of the common law exempting real property from the payment of simple contract debts, its adoption to the extent suggested is very questionable indeed; as there never was a condition of affairs in this country that required such a remedy on account of any such circumstance as that. But if on the other hand it was founded upon the principle stated by Judge Story and suggested by Mr. Pomeroy, "that a person who has gotten an estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money," then it was as applicable here as in Great Britain. That principle is eternal, and applicable to every country and every age.

I think the principle a salutary one, and that it should be enforced in a proper case. Whether it is broad enough however to uphold a vendor's lien to the extent of raising a trust in favor of a grantor, who has conveyed by deed of absolute conveyance, so as to admit of the purchase-price being made a charge upon the property conveyed, in an ordinary case of sale of real estate, I do not undertake to decide, as I do not regard the decision of that question as necessarily essential to the decision of the case under consideration. Here the conveyance was procured by the vendees to be made to their wives, appellants herein, upon an assurance that the vendees would execute to the respondent, in consideration of the conveyance of her interest in the land, good, approved, bankable notes; instead of which they merely gave their own note, which is uncollectible; and by reason of the conveyance having been so made,

Oregon Railway and Navigation Company v. Mosier.

the respondent is not able to reach the property, so as to make it applicable to the payment of her debt by an ordinary proceeding at law. The transaction was fraudulent. Property obtained under such circumstances ought to be made chargeable with the consideration money, whether the law relating to vendors' liens as it existed at common law is in force or not. The appellants, through the false promise of the vendees, obtained the respondent's property, and they certainly ought not in conscience to be allowed to keep it and not pay for it. That presents a case in which a court of equity would have an undoubted right to charge the property with the payment of the debt, irrespective of the other questions referred to. Upon that ground I think the respondent is entitled to a lien upon the property for the payment of her debt. I therefore concur in the result reached in the opinion of Judge STRAHAN, herein.

LORD, C. J., dissents.

OREGON RAILWAY AND NAVIGATION COMPANY V. MOSIER.

(14 Oreg. 512.)

Eminent domain — damages.

A railway company, having obtained a right of way by agreement from the tenant, supposing him to be the owner, and having constructed its road thereon, the owner is not entitled to have the value thereof considered in assessing the damages.*

PROCEEDING to condemn lands. The opinion states the case.

Rufus Mallory, for appellant.

A. S. Bennett, for respondent.

LORD, C. J. This was a proceeding in pursuance of the statute to condemn certain lands described in the complaint for a right of way for a railroad, and for grounds for a depot, water station, etc. The plaintiff entered and constructed its road and buildings on the land in 1881, and has since continued in the use thereof. Prior to such entry, the plaintiff had bought and paid therefor to the defendant J. H. Mosier, who was in possession and claimed to be the owner of the land, a right of way, and received from him and his

*To same effect, *Cohen v. St. Louis, etc., R. Co.* (34 Kans. 158), 55 Am. Rep. 242.

Oregon Railway and Navigation Company v Mosier.

wife a deed therefor, and in pursuance of the same entered upon said land and constructed its said railroad; that the defendant Lydia S. Mosier, during this time, was not within the State, and had no other tenant or person in possession of her interest in said land than her father, the said J. H. Mosier; and that she owns a one-seventh interest in the land sought to be appropriated, and to condemn which the proceedings were instituted.

Without further detail, it is sufficient to say that the several assignments of error relate to the rejection of certain evidence, the giving of certain instructions, and the refusal to give certain others requested; all of which raise but a single question, and that is, whether the defendants are entitled to have the value of these railroad improvements included in assessing the damages. The theory upon which the court below proceeded was, that the plaintiff, having entered upon the land without the consent of the owner, and without having instituted the necessary proceedings required by statute for the ascertainment of damages or compensation to which the defendant was entitled, and the payment of the same, was a trespasser; and that the rails, ties, and other structures which the plaintiff had affixed to the lands in the mode ordinarily done for railroad purposes became a part of the freehold, and vested in the proprietor of the soil. It is evident from the language of the instructions, that the court applied the common-law maxim, *quicquid plantatur solo, solo cedit*, with ancient rigor and strictness, and regarded the fact of attachment to the soil of structures as decisive of their character as fixtures, and the right of the owner of the land to them.

The old rule, that all things annexed to the realty become a part of it, has been much relaxed, and several exceptions recognized; as where the intention is manifest to use the alleged fixtures in some employment distinct from the use of the soil or husbandry, or where the chattel has been affixed for the purposes of trade or the mechanical arts. In modern times, for the encouragement of trade, manufactories and transportation, and owing no doubt in part to the increased value and importance of personal property, many things are now considered as personalty which are attached to the soil. The necessities and conveniences of an advancing civilization have demanded a relaxation of the strict rule, so that now attachment to the soil is only one of the several conditions to help in determining whether a given thing belongs to the realty. The

Oregon Railway and Navigation Company v. Mosier.

books indicate that various considerations have been applied by the courts in the determination of this question; and that few decisions, although involving fixtures of a similar character, can be considered of absolute authority for its disposition; but that in the nature of things every case must depend more or less upon its own special facts and peculiar circumstances. Schouler Pers. Prop., § 117.

In *Railroad Co. v. Deal*, 90 N. C. 110, the exceptions to the general rule and the reasons for them are clearly and distinctly stated by MERRIMAN, J. He said: "The general rule of law is that buildings and other structures erected on land for the better enjoyment of it become identified with, part of, and go with the land, and the tenant has no right at any time to remove them. Anciently, the law was more strict in respect to making things erected upon and attached to the land, directly or indirectly, a part of the freehold, than in modern times. As civilization has advanced and trade and the mechanic arts and other industries have multiplied and increased in development, and correspondingly in their necessities and wants of reasonable convenience, there has been a growing relaxation of the strict rules of law mentioned in their favor. It is the policy of the law to encourage trade, manufactures and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery and all such things certainly intended and calculated to promote them are treated, not as a part of the land but as distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure. Hence if a house or other structure is created upon land only for the exercise of trade, or for the mixed purposes of trade and agriculture, no matter how it may be attached to it, it belongs to the tenant, and may be removed by him during his term, and in some classes of cases, after it is ended; though the tenant after his term is over would, in going back upon the land to get his property, be guilty of a trespass, and except in that respect the property would remain his. The exceptions to the general rule pointed out above are well settled, and the practical difficulty in any case arises in pointing out when the general rule or exception applies. The exception does not depend on the character of the structure or the thing erected, or whether it is built of one material or another, or whether it be set in the earth or upon it; but whether it is for the purposes of trade or manufacture, and not intended to become identified with and part of the land." *R. Co. v. Canton Co.*, 30 Md. 352; *Van*

Ness v. Packard, 2 Pet. 137; *Central Branch R. v. Frits*, 20 Kans. 434; *Moore v. Vallentine*, 77 N. C. 188; *Pemberton v. King*, 2 Dev. 376; Taylor Land. and Ten., §§ 544-546; Schouler Pers. Prop., §§ 114-118.

The right of the State to take private property for public uses, and the delegation of such right to a corporation, subject only to the constitutional limitation that just compensation shall be made, is not questioned. Under our statute, the plaintiff, as such corporation, is authorized and empowered to acquire land for railroad purposes by agreement with the owner, or failing to agree, by appropriate proceedings for its condemnation. The mode to be pursued, how and when payment is to be made, and the rights of each party, are distinctly defined, protected and secured under its provisions. In one way or the other the law must be complied with, to make a valid acquisition of the right of way over the lands. If the corporation enters upon the land and appropriates it without the consent of the owner, or proper proceedings for ascertaining the compensation and making payment of the same, it renders itself liable to an action of trespass or ejectment, or to be enjoined in equity until compensation is ascertained and paid. *Pierce Railroads*, 167, and notes. Still it is the right of the plaintiff to acquire the land for its road, it is clothed with power of the State for that purpose, and the use to which it is sought to appropriate it is public and not private.

In view of the rights thus delegated by the State to the corporation, the purposes for which they were conferred, the public use for which the land is condemned, the just compensation required to be paid for its appropriation, and the great interest the public has in the successful operation of the road, it seems to us that there are elements which plainly distinguish the acts of a corporation, although technically a trespasser, in building its road upon land without proper authority therefor, from the acts of a common trespasser in affixing chattels to the freehold, and to render inapplicable the strict rule of law which would treat such improvements as fixtures and part of the realty, or to require the law to be administered upon the just and liberal principles of the exceptions to that rule which would record such improvements as personalty, and exclude them in computing the value of the land.

This distinction and its application to the facts here have been thus clearly stated by BICKNELL, C. J.: "The duty rested upon

the appellee, before the taking and appropriation of the lands, to have caused in the appointed mode an ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty, the entry upon and possession of the lands was wrongful; no title to them was acquired, and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession does not preclude the appellee from resorting subsequently to appropriate proceedings for the acquisition of the lands, and of consequence, availing itself of all the structures it may have placed thereon. *Justice v. N. V. R. Co.*, 87 Penn. St. 28; *Secombe v. R. Co.*, 23 Wall. 108. Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the lands — acquiring them without the consent of the owner — there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and by which the title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser the proprietor can keep the lands, and keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment of or title to the lands. There is also another distinguishing fact, the structures of the appellee were dedicated, not to the use and enjoyment of the freeholder, but to public uses, which are the consideration for the grant to the appellee for the corporate franchise, and of the right, in the exercise of these franchises, to take and appropriate private property. These elements of the case distinguish it from that of the trespasser entering upon lands, fixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty, and which following the title to the soil as one of its incidents, pass to the proprietor." *Jones v. N. O. & S. R. Co.*, 70 Ala. 232.

Equally to the point is the language of AGNEW, J.: "This is not a case," said he, "of mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter and place these materials on the land taken for public use — materials essential to the very purpose which the State has declared in the grant of the charter. It is true, the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to-wit, to make compensation or to give security for it. For this injury

Oregon Railway and Navigation Company v. Mosier.

the citizen is entitled to redress. But this redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser, the owner of the land may take and keep his structures *volens volens*; but not so in this case, for though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon." *Justice v. Ry. Co.*, 87 Penn. St. 28; see also, *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456; *Morgan's Appeal*, 39 Mich. 675; *Lyon v. Ry. Co.*, 42 Wis. 538; *Daniels v. Ry. Co.*, 41 Iowa, 52.

The object of the proceeding is to award just compensation to the owner of the land. Improvements made by the corporation, and for the use of the road and necessary for its successful operation, constitute no part of the damage or value of the land. The just compensation is for the injury which he may sustain for the taking of the land. "When this is afforded, the purposes of right and the Constitution are satisfied. It is not intended that compensation shall extend beyond the loss and injury, including that which the land-owner had not when the property was taken, but which is an incident of the appropriation, and essential to the uses for which the law confers the right of taking the property." *Jones v. Ry. Co.*, *supra*; *R. C. Co. v. Booram*, 28 N. J. Eq. 450.

The judgment must be reversed and a new trial ordered.

Judgment accordingly.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

SINCLAIR V. HATHAWAY.

(57 Mich. 60.)

Sale — implied warranty of wholesomeness of provisions.

A baker impliedly warrants the wholesomeness of bread which he sells at a discount to the peddler who distributes it.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Chapman & Smith, for appellant.

Robert Laidlaw, for appellee.

CAMPBELL, J. Plaintiff sued defendant for a balance claimed to be due for bread. Defendant claimed that the account had been balanced by bad bread returned, and a sum of \$10 paid in settlement of accounts.

Plaintiff was a baker, and defendant's business was to supply bread to customers about the city. It appears that for a period defendant was employed by plaintiff to sell his bread, and make returns and pay for the bread furnished daily. Defendant claims that on several occasions the bread furnished was bad and unwholesome, and that he returned it to a sufficient extent to overbalance

his payments, and that there was an understanding to that effect. The parties are directly at variance on the facts. There was a good deal of testimony showing that bread was often made unfit for use, and that plaintiff had to sell it for feeding animals. He swore there was never any such thing.

[Minor points omitted.]

The court also refused to charge that plaintiff was subject by law to an implied warranty that the bread was wholesome, and in the charge stated the defendant's objections to apply chiefly to its marketable quality, and to its being soiled externally by getting dirty on the floor. There was however testimony from several sources that the bread was unfit for food, apart from its external appearance.

It was held in *Hoover v. Peters*, 18 Mich. 51, that there is an implied warranty of wholesomeness in the sale of provisions for direct consumption. This question is not discussed in plaintiff's brief, and was left entirely out of view by the court, and the only reference to it was in connection with an express contract.

In this case defendant was, as plaintiff claims, in his employ as a peddler, bound to pay for his bread at a discount, and his connection with the sales brings the case within the same principle. Defendant cannot be treated as a purchaser from a wholesale dealer of articles sold in the market for purposes of commerce. Bread is an article sold for immediate consumption, and never enters into commerce, and as one of the prime necessities of life is of no use unless it is good for food. Defendant, as a mere middle-man between the baker and the consumer, and acting in his employment, had a right to expect bad bread to be made good, and the court should have so held. Mere externals he could see for himself, but bad quality would not always be detected without such a minute examination as the circumstances of such a business would render it difficult to make.

The judgment must be reversed and a new trial granted.

Judgment reversed and new trial granted.

The other justices concurred.

Butler v. Wendell.

BUTLER V. WENDELL.

(57 Mich. 68.)

Conflict of laws — assignment for creditors.

An assignment for creditors, with preferences, made in New York by a debtor living there, and valid there, will be held valid in Michigan although the Michigan statute prohibits preferences.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Griffin & Warner, for appellant.

Conely, Maybury & Lucking, for appellees.

CHAMPLIN, J. This suit was brought by the plaintiff to recover from defendants a balance of account which defendants owed to Bultman, Tompkins & Co., of New York, which had been assigned to plaintiff. On April 26, 1884, the defendants, who reside at Detroit, Michigan, owed to Bultman, Tompkins & Co., citizens of New York, an indebtedness of about \$420. On this day Bultman, Tompkins & Co. made a general assignment for their creditors, a copy of which is given in the record, and appears to be an ordinary common-law assignment of all their property, with preferences to certain of their creditors. This assignment was voluntarily made by Bultman, Tompkins & Co., in the individual names of the members of the firm at New York, to the plaintiff in this suit, who accepted the trust and entered upon the execution thereof. Minor & Richards were unsecured and unpreferred creditors of the assignors, and were citizens of Illinois, and on July 12, 1884, commenced suit in the Circuit Court for the county of Wayne against Bultman, Tompkins & Co., and at the same time garnished the defendants herein. No service was had upon the defendants in the original suit in the State of Michigan, but service was made in New York, under the authority of How. Stat., § 8087. The writ of garnishment served upon defendants was returnable on the 29th day of July, A. D. 1884, and on the 26th day of July they filed their disclosure, in which they admitted that at the time of the service of the writ upon them they were indebted to said Bultman

and Tompkins in the sum of \$420, and that they had no property or effects in their possession, or under their control, belonging to said Bultman and Tompkins, who composed the firm of Bultman, Tompkins & Co.

This suit was commenced on the 31st of July, 1884, by declaration, in the Superior Court of the city of Detroit. The defendants did not appear generally and plead the general issue, but interposed a plea in abatement, duly verified, in which they admit that they were indebted to Bultman and Tompkins before the general assignment made to plaintiff; but they recite and state the facts respecting the commencement of suit by Minor & Richards against Bultman and Tompkins in the Circuit Court for the county of Wayne; the fact that both plaintiffs and defendants in that suit are non-residents of the State of Michigan, the issue and service of a writ of garnishment upon them, and the statutory service upon the principal defendants in the State of New York; that no judgment had yet been rendered in the original suit; that the garnishee proceedings were still pending against them; that the Wayne Circuit Court had jurisdiction over them, said defendants, and of the action, and of the right to subject them to the claim of Minor & Richards in said cause; and that all and every of the causes and rights of action contained in plaintiff's declaration are the same identical causes and rights of action on account of and by reason of which the defendants are sought to be adjudged liable as garnishees, and are the very point and subject of controversy in said suit; concluding with a verification and prayer for judgment quashing the declaration.

The plaintiff filed a replication, and the judge of the Superior Court has made a written finding of facts, substantially as set forth in the plea of abatement. He also found that the plaintiff Butler was the assignee of Bultman and Tompkins of the said claim against the defendant Wendell, under a general assignment for the benefit of creditors, made and dated the 26th day of April, A. D. 1884, by said Bultman and Tompkins to him under the statutes of the State of New York in such cases made and provided; a true copy of which was attached to and made a part of defendants' plea in abatement. Thereupon he gave judgment for defendants that the declaration be quashed, and for costs. Plaintiff brings error.

The only question is whether the plea in abatement, which was found to be true by the court, should abate the plaintiff's action.

How. Stat., § 8085, reads as follows: "If any person shall claim any property as aforesaid, in the hands of any garnishee, by assignment for the principal defendant, or otherwise, the court may permit or cause him to appear and maintain his right in such mode as the court shall direct." It will be observed that the assignment of this debt occurred on April 26, 1884, which was prior in time to the commencement of the garnishee proceedings. There can be no doubt that as between Bultman and Tompkins and George A. Butler, the legal title of the indebtedness from defendants to Bultman and Tompkins passed to their assignee; and if this be so, it would seem that there could be no objection to the right of the assignee to enforce the demand against the defendants. But it is claimed by the defendants that inasmuch as the instrument under which the title passed was a general assignment for the benefit of creditors under the statutes of the State of New York, it would not be enforced in this State as being valid or effectual to carry the debt to Butler as against the attachment of the debt made by Minor & Richards. The defendants assume that because the findings of facts state that the assignment in question was made "under the statutes of New York in such case made and provided," such statutes must be a system of insolvent laws in that State, and contain provisions of a local nature regulating and restricting the rights of the assignee, and prescribing his duties in the discharge of his trust. And they claim therefore that the assignment has no extra-territorial force, and it enforced at all, will be so only as a matter of comity; and that it will not be enforced at all as against a creditor getting a lien under our laws.

The assignment is set out in full in the plea of abatement, but there is no allegation in the plea that the law under which the assignment was made was an insolvent law of that State, or that it contained any restrictions or limitations upon the common law as to assignments for the benefit of creditors. If the statute of the State of New York did not in any manner change the common law relative to assignments for the benefit of creditors, nor the manner of enforcing them, but was simply in affirmance of the common law upon that subject, the mere fact that such assignment was made under the laws of the State affords no reason for confining the enforcement of the assignment to the territorial jurisdiction of such State. There is nothing in the record before us to show why such assignment should not be enforced here. Upon the face of the in-

strument it appears to be an ordinary common-law assignment for the benefit of creditors, with preferences, and does not appear to be executed under or in pursuance of any statute. Being valid in the State where made, it must be considered valid here, unless opposed to some positive enactment or the policy of the laws of this State. It is claimed that it is opposed to How. Stat., § 8739, which declares that all assignments commonly called common-law assignments for the benefit of creditors shall be void unless the same shall be without preferences as between such creditors, and unless the instrument, or a copy thereof, an inventory of the assigned property, a list of the creditors of the assignor, and a bond for the faithful performance of the trust by the assignee, shall be filed in the office of the clerk of the Circuit Court of the county where the assignor resides; or if neither the assignor nor assignee are residents of this State, then of the county where the assigned property is principally located. This section of the law has no extra-territorial force. It was intended to affect such assignments as are made in this State, and was not intended to affect assignments made in other States by the citizens thereof.

Assignments with preferences for the benefit of creditors are valid instruments at the common law, and if made in this State can only be challenged at the instance of creditors of the assignor. The defendants do not stand in that relation to the assignors, Bultman and Tompkins, and are not therefore in a position to attack the legality of the assignment because of the fact that it gives preferences. This point was recently passed upon by the Supreme Court of Massachusetts in the case of *Train v. Kendall*, 137 Mass. 366. That case in its facts is quite similar to this, and we think was decided upon correct principles, and is an authority for the views herein expressed. The proper course for the defendants to pursue to avoid a double liability is for them to apply to the Circuit Court for the county of Wayne for leave to file a supplemental disclosure, in which they may set forth that the debt is claimed to be assigned to Butler. They may also give notice to Minor & Richards of the suit against them by the assignee of the debt, and call upon them to defend the action; in which case they will be bound by the judgment should one be rendered against the garnishees. It follows from what we have said that the judgment below must be reversed, and the defendants are at liberty to plead issuably within thirty days.

The other justices concurred.

Judgment reversed.

National Copper Company v. Minnesota Mining Company.

NATIONAL COPPER COMPANY V. MINNESOTA MINING COMPANY.

(57 Mich. 83.)

Trespass — continuing — statute of limitations.

Breaking through the partition of an adjoining mine is not a trespass unless accompanied by an encroachment upon the latter premises, and where an action for such an encroachment is barred by the statute of limitations, the subsequent flow of water through the opening does not afford a basis for an action.*

TRESPASS. The opinion states the case. The plaintiff had judgment below.

T. L. Chadbourne, for appellant.

Chandler, Grant & Gray, and *G. V. N. Lathrop*, for appellee.

COOLEY, C. J. This is an action for trespass. The following is a statement of the case, as made for the plaintiff, for the argument in this court.

“The plaintiff and defendant are corporations, which for twenty-five years and more have been engaged in copper mining in Ontonagon county. Their mines adjoin each other. Each owns the land in fee on which its mine is situated. The plaintiff, in carrying on its mining operations, left a wall of rock, from fifteen to eighteen feet thick, next to the boundary line of defendant’s mine. This was left as a barrier and protection to its mine against water or other encroachments from the Minnesota. The Minnesota left no such barrier; it not only worked up to the boundary line but broke through into defendant’s mine. About the year 1866 the plaintiff, at about forty feet above its fourth level, and from twenty to twenty-five feet from the boundary line, drilled a hole of the ordinary size, about one and one-half inches in diameter, and when the blast was fired it blew through into the opening which had been previously made by the defendant into the plaintiff’s territory. The drill-hole was left through from two to two and one-half feet of solid rock. Captain Chynoweth, then the agent of plaintiff, examined this hole and the surroundings, and immediately gave orders to cease work there. This was done as a further protection against

* See *Hargreaves v. Kimberly* (26 W. Va. 787), 53 Am Rep 121, and note, 123.

National Copper Company v. Minnesota Mining Company.

the defendant. No work was done at this point after that until the winter of 1883-4. The plaintiff had no knowledge of any further trespass at this point until February, 1884, under the circumstances related hereafter. The pump of the defendant was stopped in 1870, and that of the plaintiff in 1871 or 1872. Plaintiff's mine filled up to the adit level in about five years. Since 1870 the defendant has worked his mine more or less upon tribute, and so did the plaintiff, until May, 1880, when it resumed work. In order to avoid liability for the trespass committed by it at the plaintiff's fourth level (being the defendant's fifth level), the defendant sought to show, and did show, another hole at the first level between the two mines. A continuation of the inquiry showed that this hole also was about twenty feet from the boundary line on the plaintiff's side, and that defendant had here trespassed twenty feet upon plaintiff's land. We do not think that the history of mining upon Lake Superior will disclose another instance of such disregard of the rights of an adjoining mine-owner. This encroachment and trespass by the defendant at the defendant's fifth level occurred about the year 1859.

"In May, 1880, the plaintiff resumed mining operations and commenced to pump the water from its mine. The six-inch pump, formerly used by the mine, and which had always been adequate to keep the mine unwatered, proved wholly inadequate, and it was compelled to get a twelve-inch pump, and even this was not sufficient in the spring; and in 1882 the water gained on them one hundred and twenty feet, and in 1883 two hundred and twenty-two feet with the pump working night and day. Captain Parnell, the agent of the plaintiff's mine was thoroughly acquainted with it, having worked in the mine years before; he soon became convinced that the bulk of the water came from the defendant's mine. He found that the water came from the fourth level. He cleaned out the level, and on reaching the point where the drill-hole had been made years before, he found that the rock had been all blasted away from the Minnesota side, and that the water was rushing through an opening from twenty to twenty-five feet high and twelve feet wide. When discovered there was a volume of water seven feet wide flowing from the Minnesota into the National. When the defendant made the second encroachment at this point does not clearly appear; according to the defendant's witness Spargo it was in 1871 or 1872. This witness was an employee of the defendant, and one of its trib-

National Copper Company v. Minnesota Mining Company.

utors. He says he saw the hole from the Minnesota side, and it was then six to eight feet high and from four to five feet wide. William George, a witness for defendant, last saw the hole in 1870 or 1871. It was then about a foot in diameter. The witness was then working for the defendant as tributor and captain. Thomas James was in charge of the mine. He admits that the defendant's tributors were then mining there. This same Captain James has been in charge of the defendant's mine as agent ever since.

"It was not denied in the court below, and we presume will not be in this court, that the defendant committed these several acts of trespass. But in proof of the fact we refer to the admission of the agent Harris, the evidence that the track of a tram-road, sollars, and a system of timbering were found constructed from the fifth level of defendant's mine into this opening, and the testimony of plaintiff's witnesses already referred to. Furthermore it is beyond dispute that the defendant knowingly and willfully committed these acts of trespass, and broke down the barrier which the plaintiff had so carefully left to protect its mine for all future time. and against all possible dangers.

About 1870 the defendant concluded to abandon regular mining, stopped its pumps, and commenced what is known among miners as robbing the mine. It placed its tributors at work at the bottom of the mine, took out all the copper ground that could be found, took out the supports of the roof of the mine, and allowed it to settle or cave in. This was all done under the direction of the defendant's agent, James. The defendant's mine is situated upon a hill or mountain side. The result was that the surface of the ground became depressed, and openings were made in it. Defendant's agent, James, testified to the opening of this character on the surface of the Minnesota, amounting in all to over five hundred feet in length; some were three or four feet wide. Into these openings the water from rains and melting snow ran into the plaintiff's mine, through the opening at the fourth level. But for these openings the water would have run down the hill-side. As one of defendant's own witnesses expressed it, 'There has been a general falling away of the bluff.' There were no such openings on the surface of the National. In fact, we everywhere find the plaintiff conducting its mining operations with due regard to the rights of adjoining owners; while we find the defendant conducting its operations in the most reckless disregard of such rights."

National Copper Company v Minnesota Mining Company.

The above is a sufficient statement of the facts for a discussion of the principal question in the case, viz.: Is the plaintiff's right of action barred by the statute of limitations?

The court in the declaration on which the parties went to trial alleged that the defendant, on March 15, 1882, and on divers days and times between that day and commencement of suit, with force and arms broke down the partition wall between the mine of the plaintiff and the mine of the defendant, and let the water from its said mine into the mine of the plaintiff, and then and there filled the mine of the plaintiff with water, greatly damaging its timbering, workings, walls and machinery, hindering and preventing the plaintiff from carrying on and transacting its lawful and necessary affairs and business, and causing the plaintiff great damage and expense in removing water from its mine, etc.

The defendant pleaded the general issue, with notice that the statute of limitations would be relied on. The plaintiff recovered a large judgment.

I. The time limited for the commencement of suit for trespass upon lands in this State is two years from the time the right of action accrues. How. Stat., § 8714. This action was commenced in May, 1884, and it is not claimed that damages for the original trespass can be recovered in it. The contention of the plaintiff may be succinctly stated as follows:

1. Had the plaintiff instituted suit within two years from the original trespass, the recovery would have been limited to such damages as were the direct and immediate result of such trespass. The subsequent flowage of water through the opening was not the direct, immediate, or necessary result of breaking down the barriers; therefore no damages could have been recovered therefor in an action so brought.

2. Two trespasses may be the result of one act. In other words, one trespass may cause another, and he who commits the wrongful act in such a case will be responsible for both trespasses.

3. In this case no action accrued for the flowage of water into the plaintiff's mine until the flowage actually took place, but when flowage occurred as a result of defendant's wrongful act it was a trespass, and if it continued from day to day there was a continuous trespass for which repeated action might be maintained.

Upon these positions the plaintiff plants its case, and unless they are sound in law the recovery cannot be supported. All the right

National Copper Company v. Minnesota Mining Company.

of recovery for the original trespass, which consisted in breaking through into the plaintiff's mine, was long since barred, and it is not claimed that there was from the time of the first wrong a continuous trespass which can give a right of action now. The merely leaving an opening between the two mines is not the wrong for which suit is brought, but it is the flowage of water through the opening which is complained of as a new trespass; the original wrongful act of the defendant in breaking through being the cause, and the injurious consequence when it happened, connecting itself with the cause to complete the right of action.

In support of its contention that the case before us may be regarded as one of continuous trespass from the first, several authorities are cited for the plaintiff, which may be briefly noticed. Among them is *Holmes v. Wilson*, 10 Ad. & El. 503. It appeared in that case that a turnpike company had built buttresses on the plaintiff's land for the support of its road. The act was a trespass, and the plaintiff recovered damages therefor; but this, it was held, did not preclude its maintaining a subsequent action for the continuance of the buttresses where they had been wrongfully placed. The ground of the decision was that in the first suit damages could be recovered only for the continuance of the trespass to the time of its institution. There could be no legal presumption that the turnpike company would persist in its wrongful conduct, and consequently prospective damages, which would only be recoverable on the ground of such persistent wrong-doing, would not have been within the compass of the first recovery. The cases of *Bowyer v. Cook*, 4 C. B. 236; *Thompson v. Gibson*, 7 M. & W. 455; *Russell v. Brown*, 63 Me. 203; and *Powers v. Council Bluffs*, 45 Iowa, 652; s. c., 23 Am. Rep. 175, are all decided upon the same principle. *Cumberland, etc., Co. v. Hitchings*, 65 Me. 140, was one of the wrongful filling up of a canal by a trespasser. It was held that the trespasser was under legal obligation to remove what he had unlawfully placed on the plaintiff's premises, and that so long as he suffered the obstruction to remain, he was guilty of a continuous trespass from day to day. In *Adams v. Railroad Co.*, 18 Minn. 260, and *Troy v. Railroad Co.*, 23 N. H. 83, railroad companies, which by trespass had entered upon the lands of individuals and constructed and begun the operation of railroads, were held liable as trespassers from day to day so long as the operation of the road was continued. The principle of decision in all these cases is clear

National Copper Company v. Minnesota Mining Company.

and not open to question. In each of them there was an original wrong, but there was also a persistency in the wrong from day to day; the plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day therefore the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed.

To make these cases applicable, it is necessary that it should appear that the action of the defendant has been continuously wrongful from the first. Whether it can be so regarded will be considered further on. The plaintiff however does not, as we have seen, rely exclusively upon this view. Its case is likened by counsel to that of a farmer, whose fences are thrown down by a trespasser; the cattle of the trespasser on a subsequent day entering through the opening. In such a case it is said there are two trespasses; the one consisting in throwing down the fences, and the other in the entry of the cattle; and the right of action for the latter would accrue at the time the entry was actually made. The plaintiff also cites and relies upon a number of cases in which the act of the party which furnishes the ground of complaint antedates the injurious consequence, as the original trespass in this case antedated the flowing from which the plaintiff has suffered damage.

One of these cases is *Bank of Hartford County v. Waterman*, 26 Conn. 324. In that case action was brought against a sheriff for a false return to a writ of attachment. The falsity consisted in a misdescription of the land attached. When suit was brought, the period of limitation, if it was to be computed from the time the return was made, had already run; but under the statute the plaintiff was entitled to bring suit only after he had taken out execution and had a return made upon it, which would show a necessity for a resort to the attached lands. It was only after such a return of execution that the plaintiff would suffer even nominal damage from the official misfeasance; and it was therefore a necessary consequence that the time of limitation must be computed from that time, and not from the time of the false return.

Another case is that of *McGuire v. Grant*, 25 N. J. L. 356, which is to be referred to the same principle. The defendant removed the lateral support to the plaintiff's land by an excavation,

National Copper Company v. Minnesota Mining Company.

made within his own boundaries. Injury subsequently resulted to the plaintiff in consequence. The statute of limitations was held to run from the time the damage occurred; the excavation not being of itself a tort until damage resulted. The case of *Bonomi v. Backhouse*, El., Bl. & El. 622, was like the last in principle, and was decided in the same way.

The plaintiff also, in this connection, likens its case to that of one who, in consequence of a ditch dug upon his neighbor's land, has water collected and thrown upon his premises to his injury. It is not the act of digging the ditch that sets the time of limitation to running in such a case, but it is the happening of the injurious consequence.

The case supposed however is not a case of trespass. The act of digging the ditch was not in itself a wrongful act. The owner of land is at liberty to dig as many ditches as he pleases on his own land, and he becomes a wrong-doer only when by means of them he causes injury to another. If he floods his neighbor's land the case is one of nuisance, and every successive instance is a new injury. But here, as in the case of a continuous trespass, prospective damages cannot be taken into account, because it must be presumed that wrongful conduct will be abandoned rather than persisted in, and that the party will either fill up his ditches or in some proper way guard against the recurrence of injury. *Ballishill v. Reed*, 17 C. B. 696. Cases of flooding lands by dams or other obstructions to running water are cases of this description. *Baldwin v. Calkins*, 10 Wend. 169; *Mersereau v. Pearsall*, 19 N. Y. 108; *Plate v. Railroad Co.*, 37 N. Y. 472. So are cases of diverting water, to the flow of which upon his premises the plaintiff is entitled. *Langford v. Owsley*, 2 Bibb, 215. So are cases of the wrongful occupation of a public street, whereby the access of the plaintiff to his premises is obstructed. *Carl v. Railroad Co.*, 46 Wis. 625. Other cases cited for the plaintiff and resting on the same principle, are *Thayer v. Brooks*, 17 Ohio 489; *Blunt v. McCormick*, 3 Den. 283; *Winchester v. Stevens Point*, 58 Wis. 350; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Spilman v. Roanoke Nav. Co.*, 74 N. C. 675; *Loweth v. Smith*, 12 M. & W. 582. The case of *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765, was one of nuisance. A turnpike company made a covered drain with gratings at intervals and catch-pits. In consequence of the insufficiency of the catch-pits, or of their not being kept in proper condition, the

National Copper Company v Minnesota Mining Company

plaintiff's colliery was flooded every time there was a heavy shower. In an action for this flooding it was held that every damage was a new injury and gave a new right of action. The ruling sustained the position taken for the plaintiff in the case, which was thus succinctly stated by counsel *arguendo*: "The distinction which pervades the cases is this: Where the plaintiff complains of trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained."

The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account, and the plaintiff would have recovered for it. But there was no continuous trespass from that time on. The defendant had built no structure on the plaintiff's premises, was occupying no part of them with any thing it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All he had left there was a hole in the wall. But there is no analogy between leaving a hole in the wall on another's premises and leaving houses or other obstructions there to incumber or hinder his occupation; the physical hindrances are a continuance of the original wrongful force, but the hole is only the consequence of a wrongful force which ceased to operate the moment it was made.

If therefore the plaintiff had brought suit more than two years after the original trespass, and before the flooding of its mine by water flowing through the opening had begun, and if the statute of limitations had been pleaded, there could have been no recovery. The action for the original wrong would then have been barred, and there had been no repetition of the injury in the meantime to give a new cause of action. The mere continuance of the opening in the wall could not be a continuous damage. *Lloyd v. Wigney*, 6 Bing. 489. The right of action, if any, for which the plaintiff can complain, must therefore arise from the flowing itself as a wrongful act, there being no longer any action for the original breaking, and no continuous acts of wrong from that time until the flowing began.

National Copper Company v. Minnesota Mining Company.

The flowage caused a damage to the plaintiff ; but damage alone does not give a right of action ; there must be a concurrence of wrong and damage. The wrong then must be found in leaving the opening unclosed and permitting the water to flow through. It must therefore rest upon an obligation on the part of the defendant either to close the opening, because persons for whose acts it was responsible had made it, or to restrain water which had collected on its own premises from flowing upon the premises of the plaintiff to its injury. The latter seems to be the ground upon which the plaintiff chiefly relies for a recovery.

In the argument made for the plaintiff in this court stress is laid upon the fact that the damage which has actually resulted from the flooding could not have been anticipated at the time of the original trespass, and therefore could not then have been recovered for. This consideration, it is urged, ought to be decisive. But while we agree that it is to be considered in the case for what it is worth, it is by no means necessarily conclusive. The plaintiff must fix some distinct wrong upon the defendant within the period of statutory limitation, or the action must fail ; and there is no such wrong in this case unless the failure to prevent the flowing constitutes one. The original act of wrong is no more in question now, after having been barred by the statute, than it would have been if damages had been recovered or settled for amicably ; nor do we see that it can be important in a case like the present, where the wrong must be found in the injurious flowing, whether there was or was not a wrong originally. If there was, it stands altogether apart from the wrong now sued for, with an interval between them when no legal wrong could have been complained of.

The mere fact that an opening was made by the defendant between the two mines would not of itself have been a trespass unless the defendant invaded the plaintiff's premises in making it. Each party had a right to mine on its own side to the boundary. *Wilson v. Waddell*, 2 App. Cas. 95; and if the plaintiff had first done so, the defendant might have done the same at the same point, and in that way have made an opening rightfully. The difference between the case supposed and this is, that here the defendant was found to have gone beyond the boundary and committed a trespass. But suppose the defendant had then made compensation for the trespass, so far as it was then damaging, how would the case have differed from the present? The opening would re-

main, made by the defendant, through which, if the water was allowed to collect in his mine, it must eventually pass; and if he was under obligation to keep it within the bounds of his own premises, he would be liable for allowing it to pass, otherwise not. The fact that compensation was not actually made for the breaking away of the plaintiff's barrier is immaterial when the statute has run, as has been already explained.

The case of *Clegg v. Dearden*, 12 Q. B. 576, is not unlike in its facts the case before us. In that case also there had been a wrongful breaking through from one mine to another, and an injurious flowage of water through the opening. The facts were found by special verdict, and Lord DENMAN, in pronouncing judgment, said, "The gist of the action, as stated in the declaration, is the keeping open and unfilled up an aperture and excavation made by the defendant into the plaintiff's mine. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action therefore is the not filling up the excavation made by him on the plaintiff's side of the boundary and within their mine. It is not, as in the case of *Holmes v. Wilson*, 10 Ad. & El. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiffs; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiffs, as in the case of *Thompson v. Gibson*, 7 M. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiffs' land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiffs' land and fill up the excavation; such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty. It was however contended on the part of the plaintiffs, that admitting this to be so, there nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs through the aperture he had made; but the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon a breach of any such duty, if it exists, but upon the omission to fill up the aperture made by them

National Copper Company v. Minnesota Mining Company.

in the plaintiffs' mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of not guilty."

If this case was rightly decided, it should rule the one before us. It has been followed by the Supreme Court of Ohio in *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583, in a case which also closely resembles this upon its facts, and is not distinguishable in principle.

It seems to us that these cases are sound in law as well as conclusive. The only wrongful act with which the defendant is chargeable was committed so long before the bringing of suit that action for it was barred. Had suit been brought in due time, recovery might have been had for all damages which could then have been anticipated as the natural and probable result of the wrongful act. If the particular damages which have been suffered could not then have been anticipated, it is because it could not then be known that the defendant would cease mining operations and the plaintiff would not. There could be no flowing from one mine into the other while both were worked; and had the plaintiff ceased operations and the defendant continued to work, the defendant would have suffered the damage instead of the plaintiff. But neither party was under obligation to keep its mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it. And had the plaintiff brought an action within two years from the time of trespass, its recovery would necessarily have been had with this undoubted right of abandonment in view. But a jury could not have awarded damages for any exercise of a right, and they could not therefore have given damages for a possible injury to flow from such an abandonment. This is on the plain principle that the mere exercise of a right cannot be a legal wrong to another, and if damage shall happen, it is *damnum absque injuria*.

This view of the case is conclusive, but there is another that is equally so. The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this which was not then so far probable that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the cost of restoring the barrier which had been taken away; and if it had done so, and made the restoration, the damage now complained of could not have hap-

Kitchen v. Hartford Fire Insurance Company.

pened. It thus appears that complete redress could have been had in a suit brought at that time, and that being the case, the plaintiff is not entitled to recover now for an injury for which an award of means of prevention was within the right of action which was suffered to become barred. The right which then existed, being a right to recover for all the injury which had then been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a new suit. The wrong which had then been committed was indivisible, and the bar of the statute must be as broad as the remedy was which it extinguishes.

The judgment must be set aside and a new trial ordered.

The other justices concurred.

KITCHEN V. HARTFORD FIRE INSURANCE COMPANY.

(57 Mich. 125.)

Insurance — additional — notice to agent.

An applicant for fire insurance told the agent issuing the policy that he meant to get other insurance, and asked him to notify the company. The agent told him to get the insurance, and he would notify the company afterward. The applicant had no notice of any limitations of the agent's authority. *Held*, that the company was estopped to allege that the policy forbade additional insurance without its consent.

ACTION on an insurance policy. The opinion states the case. The plaintiff had judgment below.

M. N. & R. A. Montgomery, for appellant.

Wizom & Mosely and *Jas. M. Godell*, for appellee.

CHAMPLIN, J. This is an action brought by the plaintiff to recover from the defendant the amount claimed to be due upon a policy of insurance.

The policy in question was issued at the company's agency in Chicago, and is there countersigned as of date of January 12, 1883. The risk was to commence on that day at noon and extend to Jan-

Kitchen v. Hartford Fire Insurance Company.

uary 12, 1884, at noon. The policy was issued upon a written application signed by the assured, which was made a condition of the insurance, a part of the contract, and a warranty on the part of the assured. The property insured consisted of a store building, valued at \$1,200, and insured for \$800, and a stock of goods contained in the store building, valued at \$5,000, and insured for \$1,500, located at Bancroft, Shiawassee county, Michigan. The application for insurance was made to F. M. Douglas, who was an agent of defendant residing at Bancroft, and duly authorized to solicit and forward applications for insurance, deliver policies and renewals to applicants, and collect and forward premiums on same, subject to a book of instructions furnished him and made a part of his authority and also to such rules and instructions as he might receive from time to time from the Chicago office. The book of instruction and the rules and instructions were not given in evidence.

The company employs two kinds of agents, one called a surveyor, to which class Douglas belonged. These agents were not intrusted with blank policies, and had no authority to fill out policies, or make indorsements thereon. The other kind are styled recording agents, who are intrusted with the custody of policies, and have authority to fill out and deliver them, as well as to make indorsements thereon.

The application signed by plaintiff was dated January 11. In it nothing is said about the effect upon the policy to be issued thereunder in case other insurance is effected upon the property insured without the consent of the company. The only reference to other insurance are the following questions: "What other insurance on property; in what company, and rate?" To which there is no answer. "What rate has been paid?" Answer. "Two." "Has risk been declined by any company?" A. "No." Mr. Douglas was postmaster at Bancroft, and taking this application from Mr. Kitchen, forwarding it to the company, delivering the policy, and collecting the premium in this single case, is all the insurance business he ever did.

The policy contains the following clause: "If an application, survey, plan or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in written or verbal application, makes any erroneous representations, or omits to make known any fact pertaining to the risk; or if there shall be any other insurance, whether valid or otherwise, on the property insured, or any part thereof, at

Kitchen v. Hartford Fire Insurance Company.

the time this policy is issued, or at any time during its continuance, without the consent of this company written hereon, * * * this policy shall be void."

When Mr. Kitchen made the application to Mr. Douglas for the insurance, he informed him that he should take out other insurance upon his stock with Mr. Simonson, another insurance agent at Bancroft, who was then absent, as soon as he returned home. Mr. Douglas says he told Mr. Kitchen it would not be necessary to mention it in the application, but when he got his policy from Mr. Simonson he would have to get permission from the Hartford. After he received the Hartford policy, and within two or three days, he took in the policy of the Sun Insurance Company, represented by Mr. Simonson, and Mr. Kitchen testifies that he at once informed Mr. Douglas, and requested him to notify his company of such additional insurance.

The store and contents burned September 3, 1883, and were totally lost. October 8, 1883, proofs of loss were made, and forwarded to the company's agency at Chicago on October 16, and soon after he received the following reply:

"CHICAGO, *October 19, 1883.*

"ELIJAH D. KITCHEN, Esq., Bancroft, Michigan :

"DEAR SIR — We are in receipt of yours of the 16th inst., inclosing proofs of loss under policy No. 38034, of the Hartford Fire Insurance Company of Hartford, Connecticut, issued at its general agency at Chicago, Illinois, insuring \$800 on building, and \$1,500 on stock of merchandise therein, property belonging to you, and located at Bancroft, Michigan. Upon examination of such proofs of loss, we learn that there was \$2,500 other insurance upon the stock insured in said Hartford policy, which by its terms is void by reason of such other insurance without notice to this company, and its consent written thereon. We refer you to the conditions of your said Hartford policy, and hereby notify you that this company denies any and all liability under said policy number 38034, by reason of the other insurance as aforesaid, without notice and the consent of this company written thereon. Accompanying said proofs are duplicate bills of purchase which we hold subject to your order, in case you desire to use them elsewhere.

"Yours very truly,

"W. H. TAYLOR,

"Second Assistant, G. A."

Kitchen v. Hartford Fire Insurance Company.

The plaintiff contends that his case comes within and is ruled by *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143. On the other hand, the defendant claims that the case is ruled by the principles laid down in *N. Y. Cent. Ins. Co. v. Watson*, 23 Mich. 486. Both of those cases turned upon the effect to be given to the clause in policy which rendered it void in case any other insurance had been or should be made upon the property, and not consented to in writing by the company; and also whether under the circumstances of each case there had been a waiver of the condition or an estoppel by acts in *pais* by the company.

In the *Watson* case additional insurance had been taken out, and the company had never consented in writing. The trial judge left it to the jury to determine whether or not there had been any waiver of this condition or of the forfeiture under it. This court held that there was nothing to authorize this question to be submitted to the jury; that under the decisions of *Western Ins. Co. v. Riker*, 10 Mich. 279, and *Security Ins. Co. v. Fay*, 22 Mich. 467, the policy became absolutely void at once upon obtaining the last insurance without consent; that nothing could revive them short of a new contract on valid consideration, or such conduct as, by misleading the insured to their prejudice, would operate as an estoppel. And speaking of the case before it, the chief justice who delivered the opinion said: "There is no item of testimony tending, in the remotest degree, to show that any such contract was made, or that the insured did any thing by the encouragement of the plaintiff in error, or their lawful agents, to their own prejudice, or any thing which they would not have done under other circumstances. There is no evidence that the insurers knew any thing about it. But mere knowledge of it, without some other act knowingly done to the prejudice of the insured, would not amount to any thing more than knowledge that the latter had seen fit to terminate the policies."

This case was followed by *Allemania Fire Ins. Co. v. Hurd*, 37 Mich. 11, where a similar clause was under consideration, and there it was not claimed that the company ever consented to the additional insurance, or had any notice thereof, except as appeared from a letter written by the agents of the company to the insured in reply to one received by them, as follows:

"GENTLEMEN — Your favor of the 30th inst. at hand and noted. We will of course allow other concurrent insurance with the Allemania policy, and will also place you more insurance at same rate

Kitchen v. Hartford Fire Insurance Company.

that we charged you before, and do it in 'A 1' company or companies. Our Mr. Bussey is at present in the western part of the State on special work. Trusting to hear from you at your earliest convenience, we remain," etc.

It was held that this letter did not amount to a consent to any specific additional insurance, although it expressed a willingness to permit additional insurance, and offered to place it upon the same property at the rates before charged. Mr. Justice MARSTON said: "The correspondence between the parties would not take the place of the consent required by the terms of the policy, and the policy of insurance issued by the plaintiff in error became absolutely void at once, upon the obtaining of the additional insurance without consent."

The policy in the case of *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143, contained a like clause, and one question prominently discussed in that case was whether there could be a waiver by parol, or by acts and conduct of the written condition; and it was held that there could be. The charge of the court under which a recovery was had, and which was sustained in this court, was as follows: "That in order to escape the condition the insured must show that the agent had done some act, or made some representation or remained silent when he ought to have spoken, and thereby misled the insured, and induced them to rely on the policy, to their injury, and by causing them to believe the policy remained in force, prevented them seeking other insurance, and that such conduct would preclude the company from setting up the condition, and that notice to the agent was notice to the company." The testimony in the case showed that the first application for further insurance was to the agent, who said he would try to get it placed in some other company, and after waiting a time without his doing so they placed the risk elsewhere. In a conversation the agent said it would make no difference to the company, but did not say in so many words that it need not be consented to in writing, though that inference was drawn from all that took place. Immediately after the new insurance was obtained they informed the agent of the amount by a letter left in his office, and shortly after met the agent, who referred to the new insurance, and asked why it had not been placed with him. No objection was made, and no suggestion offered, that any breach of condition had been created or would be relied on. Upon this testimony this court held that the jury had the right to

Kitchen v. Hartford Fire Insurance Company.

believe, and that the insured had reason to rely on the validity of their insurance, and that nothing had been done to invalidate it; and Mr. Justice CAMPBELL said: "If Atwater," the agent, "himself had been the insurer, it would be difficult to find a plainer case of estoppel. It would have been a direct fraud to repudiate the obligation after such conduct as could not have failed to induce the insured to rest satisfied with their policies."

It is now proper to return to the record in this case. The judge certifies that the bill of exceptions contains substantially the testimony given on the trial. With reference to obtaining additional insurance the plaintiff testified that when he applied to Mr. Douglas the following conversation occurred: "I told him that I wanted to take \$1,500 in his company on the stock, and \$800 on the building, and that I was going to take \$2,500 in the other company with Mr. Simonson as soon as he returned home. Mr. Douglas said that was all right. When he wrote the application out, I says to him, 'Now, notify your company that I am going to put this additional insurance on when you send in this application.' He says to me, 'It is unnecessary; ours is the first policy, and we don't care about that.' Then I told him to send it any way, and tell them I was going to put additional insurance on. He says, 'It is only a supposition you are going to put additional insurance on, and we cannot notify the company on supposition.'" He further testified as follows: "Mr. Simonson came back and gave me the application, and when this second policy came back that I got from Mr. Simonson, I was going to either my dinner or my supper — I will not be sure which — and had this policy with me. Mr. Simonson brought it in, and I took it. I called for my mail when Mr. Douglas was there. I says to him, 'if you have not informed your company that I have put this additional insurance on when you sent in the application, do it now, for here is the policy.' I had the policy in my hand, at the time, that I got from Mr. Simonson, the same day I got it. I never had any other talk with Mr. Douglas until after the fire. He made no answer."

Mr. Douglas' attention was called to this testimony, and he gave his version of the matter as follows: "That Mr. Kitchen said he expected to take some additional insurance with Mr. Simonson, but did not tell him the company or the amount; that he replied: 'When you get your insurance, you can get permission, or we will have to get permission from the company (the Hartford company);'

Kitchen v. Hartford Fire Insurance Company.

that Mr. Kitchen said nothing about that additional insurance that he recollected of; that he had no recollection of any talk of the kind testified to by Mr. Kitchen as having occurred in the post-office, and knew of no such talk; that he was postmaster then, and had no recollection of handing Kitchen a letter and talking with him about having received another insurance policy. He stated on cross-examination that he had a conversation with Mr. Simonson soon after the Sun policy was issued, in which he told Mr. Simonson that Mr. Kitchen said he expected to get out further insurance, or take out a policy with him; and he admitted that in a conversation with Mr. Simonson and Mr. Mosely he stated to Mr. Kitchen at the time that it was not necessary to mention the fact that he was going to obtain additional insurance in the application."

No consent was indorsed on the policy. The foregoing is all the testimony that bears on the question of waiver, or out of which an estoppel is raised to prevent defendant from insisting upon the breach of this condition of the policy. Upon this testimony there can be no question but that the plaintiff relied upon the statements of Douglas, as authorizing him to obtain additional insurance, and upon having done all that was required of him when he informed Douglas of the name of the company, and the fact that he had perfected such new insurance; and that he relied upon his insurance as effectual for his protection to the amount insured. If Douglas had been the insurer, his conduct after what transpired between him and plaintiff would have estopped him from relying on the breach of the condition. Nothing can be plainer than this. The controversy therefore, as in the *Earle* case, is reduced to the inquiry, whether with the written condition of the policy in view, Mr. Douglas had authority, or was Kitchen justified in assuming he had authority, to bind the company by such conduct as would have bound himself.

In the case referred to it was said that the powers of the agent did not appear to be restricted in any way. In this case the authority of the agent was restricted in the manner hereinbefore stated; and the question is whether the company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of premises, take applications therefor and forward them to the home company or to its branch agency, or other agency where policies are issued, to deliver poli-

Kitchen v. Hartford Fire Insurance Company.

cies and collect premiums. There is no evidence that any restrictions upon his authority as agent was brought to the knowledge of the plaintiff, or others dealing with him. He did not profess to be merely a solicitor of insurance. He professed to act as agent for defendant, signed his name to the approval of the application as agent, assumed to direct whether mention should be made of the proposed additional insurance, and gave no information to the applicant of his restricted powers. Under these circumstances, if he had no authority to waive the conditions of the policy, which he did by telling plaintiff to first take his additional insurance, and then get permission (for as was held in *New York Cent. Ins. Co. v. Watson*, the policy became void the moment the new insurance was effected), who is to suffer the loss occasioned by such want of authority, the insured who relied upon the representations and conduct of the agent, or the company whose agent he was?

The point was discussed in *Security Ins. Co. v. Gay*, 22 Mich. 467, by Mr. Justice CAMPBELL. In that case the insured relied much upon the action of the local agent after the new insurance was placed, who as representing the company at that place, and being the person through whom the insured dealt with them, might be authorized to bind them, except in matters, where by the policy itself or by other notice, his authority was made known to have been limited. Mr. Justice CAMPBELL says: "Assuming then as we must, that upon the case as it appeared on the trial, there was no valid consent until Betts may have so acted as to confer it, the question next arises whether there can be a waiver of the condition requiring written consent, and if so, whether there was any evidence which would authorize the case to go to the jury on that point. We have held heretofore that a party dealing with an agent, through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him are known to his principals. We have also held, that when with a knowledge of such facts, the insurers accept premiums and keep them and issue policies, they cannot insist upon conditions which it would be dishonest to enforce after such action." Such is this case. Kitchen had a right to presume, when he applied for a policy from Douglas, that the fact made known to him, with reference to his obtaining additional insurance, was known to his principals, and the instructions the agent then gave with reference thereto were the instructions of his principals, and that he was authorized, by the assent then given, to

Day v. Spiral Springs Buggy Company.

obtain such new insurance without avoiding his policy. The conduct of the agent at that time, and also when afterward he was informed of the obtaining of the policy in the Sun Company, and the action had in reliance upon it, would render it a fraud for the defendant to recede from what the plaintiff was induced to expect. The defendant must therefore be held bound by the representations and acts of his agent Douglas, and must be deemed estopped from now insisting upon the enforcement of this clause of its policy.

The other questions set up in the notice of defense to the action, relative to the overvaluation, were questions of fact which have been found by the jury in plaintiff's favor. There was no error in the rulings of the court in the admission or rejection of testimony. Several errors are assigned upon the language of the charge as given, but as it was in substantial accord with the views herein expressed, we perceive no error; and the judgment is affirmed.

Judgment affirmed.

The other justices concurred.

DAY V. SPIRAL SPRINGS BUGGY COMPANY.

(57 Mich. 146.)

Corporation — contract — ultra vires.

A corporation is liable *quantum meruit* on a contract *ultra vires* but not immoral, and broken by the other party.

ASSUMPSIT for goods sold. The opinion states the case. The plaintiff had judgment below.

Edward Taggart, for plaintiff.

Maher & Felker, for appellee.

COOLEY, C. J. This action is brought to recover the value of thirty-two tons of the article called "excelsior," which had been received by the defendant of the plaintiff.

The defendant is a corporation, organized, as its articles of association state, "to purchase material for, and manufacture and sell carriages, and carriage and harness hardware; also for the disposing of the right to manufacture on royalty the spiral buggy-spring,

Day v. Spiral Springs Buggy Company.

Smith's patent." In the manufacture of carriages excelsior is used for upholstering seats and backs, but for no other purpose. The place of business of defendant is Grand Rapids, Michigan.

It was shown on the trial that in April, 1883, defendant contracted with one Hulz, of Chicago, to sell and deliver to him in Chicago one hundred and seventy-four tons of excelsior, the delivery to be made at the rate of two car-loads a month, and the price to be \$14 a ton. For the purposes of this contract defendant then bargained with the plaintiff that she should manufacture the requisite quantity of excelsior and deliver it on board cars or boat at Grand Rapids, billed to Hulz at Chicago. The price to be paid by defendant was \$11.50 a ton, which after paying cost of transportation, would leave to defendant a profit on the sale to Hulz. It was known to plaintiff, when she contracted for the manufacture, that the defendant was not procuring the article for use in its business, but for the purpose of a sale at a profit in Chicago, where the defendant had no place of business, and the delivery to be made by her was to be made from time to time as required by the Hulz contract. The plaintiff was therefore fully aware that the contract of the defendant with her was purely one of speculation, and had no connection with its legitimate corporate business.

The excelsior was delivered by the plaintiff under the contract from time to time until about June 15, 1883, and was shipped to Chicago under defendant's contract with Hulz. At the time last mentioned the market value of the article had considerably advanced, and plaintiff declined to deliver any more at the price agreed upon. Part payment had been made for the quantity received, and defendant refused to pay further unless plaintiff should go on in completion of her contract. This suit was accordingly instituted.

The claim of the plaintiff is that the contract she entered into with the defendant is void in law; that therefore she was at no time under obligation to perform it; that in so far as the defendant has received excelsior from her, she is entitled to recover the value, not exceeding the price agreed upon; and having shown that the value was equal to that price, she now claims to recover it in this suit. The defendant, on the other hand, insists that the plaintiff is estopped by the contract from disputing the capacity of the defendant to enter into it; and that when she refuses to perform, she becomes liable in damages. These damages the defendant seeks to recover from the claim of the plaintiff.

The Circuit judge was of opinion that the contract made by the defendant with Hulz, not being for a corporate purpose, was *ultra vires* and void, and the contract made with the plaintiff for the purpose of meeting its requirements was void also. For the excelsior actually received by the defendant the plaintiff was held entitled to recover, as if the void contract had not been entered into; but a claim to recoupment must necessarily assume the validity of the contract, and was therefore inadmissible. The judge therefore gave judgment for the plaintiff for the value of what had been received, deducting such payments as had been made. The defendant brings error.

It is scarcely denied in this court that the contract of the defendant on which it now relies was *ultra vires*. Its corporate purposes were specified in its articles, and it was without legal power to go beyond them. The contract was one of speculative dealing, and was as much foreign to the purposes of corporate organization as would have been a contract for dealing in grain on the produce exchange, or in shares in the stock market. The State had not by law consented that its manufacturing corporations should be at liberty to make such contracts, but for reasons of sound public policy had withheld from them the power to do so. Neither had the corporators of the defendant consented that their interests might be put in jeopardy by such dealings.

But defendant relies here, as it did in the court below, upon the plaintiff's being estopped by her contract from raising the question of *ultra vires*. She has certainly admitted the power of the defendant to make the contract, and if the elements of an estoppel are to be found in this mere admission, or in this admission coupled with such action as has taken place under it, then the defendant should be entitled to recoupment.

There are some decisions which give plausibility to the position of the defendant, but we know of none that is adequate to the exigencies of this case. Parties entering into contracts with an association of persons, who are *de facto* exercising corporate powers, are not suffered to dispute the corporate authority which their contracts admit. *Swartwout v. Mich. Air-line R. Co.*, 24 Mich. 389; *Wilcox v. Toledo, etc., R. Co.*, 43 Mich. 584. But this is on the principle that a usurpation of corporate authority concerns only the State, and it is supposed the State will move on its own behalf to have the usurpation punished or restrained when it is found to

Day v. Spiral Springs Buggy Company.

exist, if the occasion seems to call for it. The case before us is not one of that description. The defendant's possession of corporate powers is conceded, and though the particular act was done without authority, the State was not the only party interested in questioning it. Every stockholder was entitled in his own interest to insist on its being repudiated, for he had not consented to put his share of the capital at the risk of any such venture. There are some cases also in which parties by false representations have induced others to act upon invalid contracts as if they were valid, and to make payments, deliver property, or otherwise change their positions in reliance upon the contracts, under such circumstances that nothing but the enforcement of the contracts will do complete justice, and in such cases the doctrine of estoppel may well be applied. But this is not such a case. No false representations are alleged, and it is not disputed that all parties were fully aware of all the facts. They must therefore be supposed to have understood that the contract in its inception was *ultra vires*. And the power on the part of such a corporation to enter into contracts of speculation, being withheld on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the State for general reasons has withheld from it. *Penn., etc., Nav. Co. v. Dandridge*, 8 Gill & J. 248. 319.

Parties may also be estopped, in some cases, from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of Comstock, C. J., in *Parish v. Wheeler*, 22 N. Y. 494, 508: "The executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so required." But this is not such a case. The contract has only been performed in part. The defendant has received a portion of the property bargained for, and we may justly assume that what has been received has passed into the hands of Hulz and been paid for, so that the defendant will lose nothing but the anticipated profits on the remainder if the contract is not enforced in its favor. Those profits it had no right at any time to count upon; and in contemplation of law, there can be no injustice in depriving it of profits which the law would not permit it to bar-

Day v. Spiral Springs Buggy Company.

gain for. No valid ground for estoppel is therefore found to exist in the case.

The defendant then, if the plaintiff has established a valid demand, is not entitled to recoup damages for refusal to make complete performance, because to allow recoupment would be indirectly to enforce the contract.

Whether the plaintiff is entitled to recover for the goods delivered and not paid for is the remaining question. The defendant has had the goods, and there is no want of equity in requiring it to make payment. They were delivered under a contract which bound neither party, and though the plaintiff is the party who now refuses to go on with it, the defendant was at liberty to do the same, and we cannot know that it would not have done so if the change in market value had been such as to make it for its interest. But however that may be, if the defendant pays for the property received, the parties will have justice meted out to them as nearly as is now possible.

It is to be observed that the contract, though void in law, involved no element of criminality, and nothing of an immoral nature. The case is not therefore one in which the law will leave the parties without redress for the consequences of criminal or immoral action. The plaintiff had a right to sell her manufacture, and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment, notwithstanding it exceeded its powers in the purchase.

The cases of *Pratt v. Short*, 79 N. Y. 437; s. c., 35 Am. Rep. 531; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; s. c., 19 Am. Rep. 781; *Harrimon v. Baptist Church*, 36 Ga. 186; s. c., 36 Am. Rep. 117, are in point, and fully sustain the judgment. The principle involved is considered at length in *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; s. c., 20 Am. Rep. 504, and is supported by *Thomas v. Railroad Co.*, 101 U. S. 71; *In re Cork & Y. Ry. Co.*, L. R., 4 Ch. App. 748; *In re National, etc., Society*, L. R., 5 Ch. App. 309, and many other cases. No doubt it results in a degree of hardship in some cases, when a party fails to obtain all that has been bargained for, but the loss of anticipated advantages, as an incident to unauthorized dealings, is one for which the parties themselves are responsible, not the law.

The judgment must be affirmed.

The other justices concurred.

MCKELLAR V. DETROIT.

(57 Mich. 153.)

Municipal corporation — street — defect — ice and snow.

The mere accumulation of ice and snow in city streets does not constitute a "defect" nor a want of "good repair."*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Henry M. Duffield, for appellant.

Brennan & Donnelly, for appellee.

CAMPBELL, J. On the 10th of January, 1884, plaintiff in the evening slipped on a cross-walk at the corner of Prospect and Division streets in Detroit, and fell and broke her arm. The occasion of her fall was claimed to be a small ridge of ice formed by the trampling of snow, and melting and freezing until the surface was uneven. She recovered below and the city brings error.

The case seems to have been fairly presented in all respects so as to raise two questions closely connected, which are, first, whether such a condition of things is such as is covered by the statute which gives a remedy for injuries on highways and cross-walks; and second, whether there is any liability without further notice than appeared here. Upon the question of damages the verdict was reasonable, and there are no other disputed points requiring attention.

It has been the settled law of this State that the right to recover depends entirely upon the statute, and the main question is dependent on its construction. Under our Constitution the title of an act is significant, and usually controlling in determining its scope, and in this case it is of some importance. The body of the statute must reasonably harmonize with it, and in this instance there is substantial harmony.

This law is entitled "An act for the collection of damages sustained by reason of defective public highways, streets, bridges, cross-walks and culverts." Pub. Acts 1879, p. 223; How. Stat.,

* See *Ologhessy v. City of Waterbury* (51 Conn. 405), 50 Am. Rep. 38; *Grossbach v. City of Milwaukee* (65 Wis. 31), 56 Am. Rep. 614.

§§ 1442-1446. In the body of the act the action is given for injuries by neglect to keep these in good repair, and in a condition reasonably safe and fit for travel, by the township, village, city, or corporation whose duty it is to keep the same in good repair. § 1442. By section 1445 it is made the duty of townships, villages, cities, or corporations to keep in good repair so that they shall be safe and convenient for public travel at all times. And power is given to levy such sum beyond the means formerly provided by law, not exceeding five mills on the dollar in each year, as will enable them to keep these easements "in good repair at all times." The liability is not to apply unless the municipality has had reasonable time and opportunity after the ways become "unsafe or unfit for travel," to put them in "proper condition for use, and has not used reasonable diligence therein." § 1443.

This statute covers all classes of municipalities, and undertakes to deal with duties common to all of them. It was not designed to put villages and cities under any different obligations from townships, in regard to the good repair of such ways as are to be kept in order. And so far as our attention has been called to them, the statutes existing elsewhere have made no essential difference. Cities naturally have many more ways to look after, but the failure to do so involves no different considerations. The judge who tried this case expressed some doubt about it, but left it to be determined by appellate proceedings, should the jury think a case made out under his charge.

The decisions upon the liability of municipalities for winter obstructions to ways, although several cases have been decided, are not as numerous as might be expected if there were any general agreement that ice and snow were to be removed at the peril of the corporation. Mr. Dillon, in his work on *Municipal Corporations*, has very little to say about it, and the works on negligence recognize the diversity of ruling under statutes and the local common law. The New England cases which were cited, and others which have been examined, appear to rest chiefly on ancient statutes which refer expressly to the duty of keeping ways clear of snow and ice. The later Massachusetts authorities are more guarded than the earlier ones, and have required stricter proof of negligence than formerly. The cases are very fully collected in 2 Eng. & Am. Corp. Cas. 565, 571, 572, 579, 588; 4 Eng. & Am. Corp. Cas. 626, 627. They agree that there is no responsibility unless there has been such

McKellar v. Detroit.

an accumulation as will amount to an obstruction of the way which is dangerous, and they also agree that a city is not liable for the manner in which its walks and other structures and ways are planned. It may perhaps be said that if the duty is absolute to remove such slippery accumulations there was enough to go to the jury in this case, provided the city was sufficiently notified. But the more important inquiry is whether the statute covers such a case.

The natural meaning of the act, both in the title and in the body, is to create liability only for having ways out of repair and defective on that account. Several authorities treat the class of obstructions in question as involving want of repair and defects. But in the absence of statutes which provide for them as such, it is not a natural construction, and the cases are more consistent which deal with these things as acts of negligence at common law. A great deal however may fairly depend on local usage in determining duties concerning highways in winter. Where it is customary to treat the removal of snow and ice as a regular part of highway management, the failure to look after it may be properly regarded as wrongful and negligent. In the Eastern States this is done much more generally than elsewhere, and as already suggested, the reported cases on the subject do not indicate any thing like universal usage in that direction. There is probably not a single northern city or town where such accidents as that appearing on this record do not occur every year. The reports would present much more numerous precedents if it were the general supposition that such actions would lie.

We have never had a Michigan statute which made express provision for removing snow and ice; and the laws regulating highway labor, and the expenditure of highway money, are all framed on the theory that work will be done when the earth is uncovered. Our cities are empowered to clean their streets, and frequently to remove snow and filth; but this has seldom if ever been made obligatory, or treated as having any thing to do with street repairs or defects. It is possible that highway money may have been expended in towns and villages to clear the tracks in winter; but if so, the instances are exceptional, and not within the language of any statute. The powers and duties of cities concerning highways, as laid down by the general incorporation act, are, except as designated, put on the same footing as those of townships. How. Stat., § 2635. They are empowered to require abutters on the streets

to remove snow and ice from the sidewalks, and to do it for them on default ; but no such reference is made as to cross-walks. §§ 2636-2641. The village act is still narrower in its operation, although similar. How. Stat., § 2855.

Our statutory system has been devised to meet the necessities of a rapidly developing country, thinly settled in many places, and with cities covering much larger spaces than would be required for a stationary population. It would be a great hardship and involve ruinous expense if all of the multitudinous ways that are subject to be affected by winter storms are to be constantly watched and diligently kept in thoroughly good condition. Most communities may be relied on to do what is necessary and feasible. But no amount of diligence can supply an adequate force and adequate means to detect the inevitable accumulations of snow trampled into hardness on every cross-walk or in every roadway. In the city of Detroit it is estimated that there are more than 10,000 cross-walks inside of the suburbs. Except during winter there is not much risk that dangerous defects will be numerous or unnoticed. A walk properly laid may be relied on, except as against very long wear or active mischief. But a few passers-by will trample the snow into ridges, and the work of removing them would be enormous. The charter makes no adequate provision for doing it, or for finding out its necessity. The municipal police, although required to use vigilance, and be faithful in doing so, is not a city agency in any sense, and there is no other agency in the appointment of the city, and for which the city could justly be held responsible, that could gather information in winter that would be at all available to secure any universal and efficient care of the streets and cross-walks. In Rhode Island, after the decision in *Providence v. Clapp*, 17 How. 161, which construed the statutes as binding the city by constructive notice of ice accumulations, the law was so changed as to exonerate from liability unless express notice was given to the city authorities of the danger existing. Such a rule is just and sensible, where the liability exists at all, because such dangers are apt to exist in many places at the same time. It would certainly be a violent presumption that any proper city official of Detroit actually knew of the existence of the ice ridge on this particular cross-walk. And it would be still more singular if at the same time there were not several hundred, if not several thousand, similar places in the city.

 Ayres v. Hubbard.

It is possible that some legal duty ought to exist for clearing off such ridges as they are raised by the feet of passengers ; but to provide for it by means which will be reasonable and not oppressive on the many towns and municipalities throughout the State will be a task of some difficulty. We are satisfied no such liability has thus far been provided for.

We think there was no cause of action made out, and that the judgment must be reversed. As the want of jurisdiction appears on the record, there is no ground for a new trial.

Judgment reversed.

SHERWOOD and CHAMPLIN, JJ., concurred ; COOLEY, C. J., did not sit.

AYRES V. HUBBARD.

(87 Mich. 322.)

Damages—cutting timber—mistake.

In an action of damages for trover of timber cut from the plaintiff's lands and hauled to a steamer, three and a half miles distant, the cutting having been done by mistake, the measure of recovery is the value at the time and place of cutting.*

TROVER. The opinion states the case. The plaintiff had judgment below.

Winsor & Snover and *Wm. T. Mitchell*, for appellant.

James H. Hall, for appellees.

SHERWOOD, J. The firm of R. B. Hubbard & Co., of which the defendant was a member, in the month of December, 1884, let a contract to John Montgomery to cut logs and timber during the winter, on their lands in Huron county, and haul and put the same afloat in Willow creek, for the agreed price of \$3.50 per thousand feet. Montgomery proceeded under his contract, and cut, hauled and placed in the creek a large quantity of logs, and the company was informed and supposed that all were taken from the land of defendant, and never knew to the contrary, so far as we can discover, until about the month of February, 1880. On the 14th day of

* See *Coal, etc., Co.* (15 Lea, 800), 54 Am. Rep. 415.

August, 1880, the plaintiff brought this suit in trover to recover for the value of the timber taken by the defendant's company from the lands of the plaintiff, and upon the trial obtained a judgment against the defendant for the sum of \$896.95. The defendant brings error, based upon the rulings and charge of the court on the subject of damages.

It appears from the testimony that the land of plaintiff, from which the timber was taken, sought to be recovered for, is about three and one-half miles from Willow creek, at the point where Montgomery delivered them to the defendant, and the plaintiff claims that he should recover the value of the logs at that point delivered in the creek. The defendant, on the contrary, insists that the conversion, if any was by his servants in the woods where the timber stood upon plaintiff's land, and that the damages for which he was liable, if any, was the value of the stumpage. The court instructed the jury in accordance with the views of plaintiff's counsel, and the verdict of the jury was rendered accordingly.

There is no evidence in the case tending to show that the defendant, his company, or Montgomery, intended any trespass or knew they were upon the land of the plaintiff in cutting the timber.

We think the Circuit judge erred in his instruction to the jury. We discover nothing in the case indicating any willful or negligent trespass on the part of the defendant or the company's employees. The general rule of damages is the value of the property lost under such circumstances at the time and place of conversion. The declaration avers plaintiff's possession of the land, and the ownership of the property taken, and that upon the land the property was taken, and there came to the possession of the defendant by finding, and on the same day and place the defendant converted the same. The record shows this declaration supported by the proofs. Complete indemnity for the actual loss sustained in this case by the plaintiff is what he was entitled to recover. In civil actions the amount of recovery does not depend upon the form of the action, in a case like the present; but whether it be upon contract or in tort, the proper measure of damages, except in cases where punitive damages are allowed, is just indemnity to the party injured for the loss which is the natural, reasonable and proximate cause or result of the wrongful act complained of. *Baker v. Drake*, 53 N. Y. 211; *Page v. Fowler*, 39 Cal. 412; *Forsyth v. Wells*, 41 Penn. St. 291; *Single v. Schneider*, 30 Wis. 570; *Hungerford v. Redford*, 29

Watrous v. Allen.

Wis. 345; *Allison v. Chandler*, 11 Mich. 542; *Warren v. Cole*, 15 Mich. 265; *Daily Post Co. v. McArthur*, 16 Mich. 447; *Northrup v. McGill*, 28 Mich. 238; *Winchester v. Craig*, 33 Mich. 205; *Allen v. Kinyon*, 41 Mich. 281; *Weymouth v. Ry. Co.*, 17 Wis. 550; *Tilden v. Johnson*, 52 Vt. 628; s. c., 36 Am. Rep. 769; *Cushing v. Langfellow*, 26 Me. 306; *Ensley v. Nashville*, 58 Tenn. 144; *Thompson v. Moiles*, 46 Mich. 42. Each case however must necessarily to a very great extent depend upon its own peculiar circumstances and equities. *Erwin v. Clark*, 13 Mich. 10; *Ripley v. Davis*, 15 Mich. 80; *Allen v. Kinyon*, 41 Mich. 281.

We think the testimony offered and rejected by the court was competent as evidence tending to show the value of the property, even under the theory of the plaintiffs. It was only one means of arriving at the value of the property at the place where the plaintiff claims the conversion occurred. In no view that we can take of the case, as presented upon this record, can the rulings of the court be sustained; and the judgment must be reversed and a new trial granted.

The other justices concurred.

Judgment reversed.

WATROUS V. ALLEN.

(57 Mich. 322.)

Covenant — against selling liquors — injunction.

A condition in a deed that no intoxicating liquors shall ever be sold on the premises is valid, and although a forfeiture will not be enforced for a breach, yet an injunction may issue against it.

BILL for injunction. The opinion states the case. The defendant had judgment below.

C. W. Perry and *J. L. Potts* and *Mann & Van Kleeck*, for complainant.

Trask, Grout & Smith and *E. D. Wheaton*, for appellee.

COOLEY, C. J. The purpose of the bill in this case is to obtain a perpetual injunction against the carrying on of the business of

dealing in intoxicating drinks on certain premises in the village of Meredith, in the county of Clare.

The allegations of the bill are as follows :

On February 28, 1884, Thomas J. McClennan was owner of the premises in question, and sold the same to the defendants James D. Allen and William F. Holtz, and made and delivered to them a deed thereof. This deed contained the following proviso:

“ Provided always, and this contract and the estate in said premises hereby created is subject to the express condition, that if the parties of the second part, their heirs and assigns, shall at any time sell or keep for sale upon said above granted premises, or knowingly permit any person under them so to sell or keep for sale, any spirituous or intoxicating liquors, whether distilled or fermented, the entire title and estate in and to said premises hereby sold and created shall cease, and the title to said premises shall thereupon at once revert to and vest in the parties of the first part, their heirs and assigns forever, and shall be lawful for the said parties of the first part, their heirs and assigns to re-enter upon said premises, and said parties of the second part, their heirs and assigns, and every person claiming under him or them, wholly to remove, expel, or put out.”

This deed was recorded in the office of the county register of deeds, March 29, 1884, but when recorded this proviso had been stricken out. Afterward, on June 7, 1884, McClennan made a general assignment and transfer of all his property, real and personal, and all actions and causes of action, reversions and benefits, to complainant Watrous, and Watrous took possession of the property under the assignment.

At the time of the execution and delivery of the deed to Allen and Holtz, McClennan was the owner of a large amount of real estate in said village of Meredith, and so continued to be until the assignment to complainant Watrous; and the bill avers “ that he platted said village, and was the proprietor and owner of the plat thereof, and was thereby directly and specially interested in having the said condition so inserted in said deed observed and enforced. and that the same was so inserted for his benefit as owner of the land and lots in the vicinity and contiguous to said premises, and that whatever rights, interests and benefits the said McClennan had by virtue of said condition and in the reversion of said premises for the violation thereof, belong to complainant.”

Watrous v. Allen.

On or about the first day of August, 1884, William O'Brien took possession of the lot so conveyed to Allen and Holtz, and has commenced the sale of intoxicating liquors thereon as a regular business. O'Brien was aware when he did so of the condition in the McClennan deed, which the bill avers was stricken out by Allen wrongfully, the act of striking it out being an act of forgery. O'Brien was warned not to enter upon such business before he did so, but refused to heed the warning. The bill avers special injury to complainant Watrous as owner of the lands conveyed to him by McClennan, and prays that the estate so conveyed to Allen and Holtz be decreed to be forfeited for breach of condition; that the defendants, and all persons holding from or under them, be enjoined and restrained from giving, delivering, selling or keeping for sale any spirituous or intoxicating liquors, whether distilled or fermented, on said premises, and for other and further relief.

The defendants answered, admitting the principal allegations in the bill, but alleging that the condition in McClennan's deed to Allen and Holtz was inserted without the knowledge of the grantees, who were not aware of it until some time afterward and then erased it, as they claimed they had a right to do. Defendants denied "that said complainant sustains any damage by reason of the sale of liquors as described therein, except that said complainant Watrous and said McClennan are engaged in the sale of liquor in said village, and it is possible that they may not be able to sell quite as much liquor as they would if there was no opposition, and they may be compelled to sell a better article and at more reasonable rates; and in the loss of such profits as a monopoly of the liquor trade might give them, they may be to that extent damaged, but that complainant suffers damage in no other way. And defendants aver that if said prohibitory clause had been lawfully inserted in said deed it was void, as a clause inserted to create a monopoly, and in restraint of trade." They also claimed that McClennan consented to waive the condition before O'Brien began business.

The cause was heard on pleadings and proofs, and the bill dismissed. The complainant appears to have made an affirmative case upon the facts, but defendants insist that they established their allegation that the condition was not in the deed with their assent. On this the burden of proof was upon them, but we cannot say the preponderance of evidence is in their favor. The erasing of the condition was without any application to McClennan for correction,

and had all the appearance of having been done secretly in the expectation of obtaining a benefit from a recording of an instrument that on its face showed no restrictions.

The defendants also rely upon evidence that McClennan waived the condition. An agent of O'Brien testified that in a certain interview, in which McClennan several times refused to assent to waiving the condition, he finally did so. The evidence is not very satisfactory, but when followed by further testimony from the same agent that he soon afterward went to McClennan, and endeavored to secure his consent to O'Brien's proposed business by promising him ten per cent of the profits, we are not left in doubt that there is some error in the first evidence.

The defendants also rely upon the legal proposition that conditions in restraint of trade are void. This, in its application to a parallel case, was considered in *Beal v. Chase*, 31 Mich. 490, where the authorities are collated and examined. It was there held that a covenant in restraint of trade, so far as the covenantee had in his own business an interest in enforcing it, might be valid. This case comes within the decision in that case. See also *Doty v. Martin*, 32 Mich. 462; *Caswell v. Gibbs*, 33 Mich. 332. There is nothing in the position taken by the defense that the condition tends to the establishment of a monopoly in the business of selling intoxicating drinks, and is thus opposed to public policy. It is not the policy of this State that every one should sell intoxicating drinks who pleases. On the contrary, heavy taxes are levied and onerous conditions imposed by the State for the express purpose of limiting the number of those who shall sell; and the condition in question is directly in the line of that policy, instead of being opposed to it.

This disposes of all the grounds of defense which are brought to our notice by the brief in this court.

The complainant is not entitled to enforce a forfeiture of the estate in equity, for equity does not aid in enforcing forfeitures. *Crane v. Dwyer*, 9 Mich. 350; *White v. Port Huron, etc., R. Co.*, 13 Mich. 356; *Wing v. Railey*, 14 Mich. 83; *Horsburg v. Baker*, 1 Pet. 232; *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Smith v. Jewett*, 40 N. H. 530; *Warner v. Bennett*, 31 Conn. 468. But on the hearing in this court they do not claim a forfeiture, and only ask the enforcement of the condition as an agreement. This is a remedy much more favorable to the defendants than the remedy of law, for the equitable remedy only compels the party to abide by

Watrous v. Allen

the agreement, while the remedy at law takes from him the property he has paid for, and operates as a punishment. Injunction then to restrain a breach of a condition, if the condition is legal, is perfectly reasonable. It was so declared in *Clark v. Martin*, 49 Penn. St. 289, where as in this case the remedy was sought by a grantee of the party in whose favor the condition had been reserved. He had become purchaser of a lot adjoining that which the defendant had bought subject to the condition, and was held entitled to a perpetual injunction, upon the ground that the condition was imposed for the benefit of such adjoining lot. "Common sense," say the court, "cannot doubt its purpose; and thus it becomes plain that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be." A like case is *Whitney v. Union Ry. Co.*, 11 Gray, 359. BIGELOW, J., delivering the opinion of the court, after speaking of the restrictions which appeared in the deed then in question, said: "The purpose of inserting them in the deed is manifest. It was to prevent such a use of the premises by the grantee and those claiming under him, as might diminish the value of the residue of the land belonging to the grantor, or impair its eligibility as sites for private residences. That such a purpose is a legitimate one, and may be carried out, consistently with the rules of law, by reasonable and proper covenants, conditions or restrictions, cannot be doubted. Every owner of real property has the right so to deal with it as to restrain its use by its grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint on trade. Nor can there be any doubt that in whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity." And he proceeds to show that it may also be enforced as against those who shall derive interest through or under the grantee.

Those cases, in which it was held that the fact that a penalty or forfeiture is imposed for doing a prohibited act is no obstacle to the interposition of equity by injunction, rest on the same principle. *French v. Macale*, 2 Drury & War. 269; *Coles v. Sims*, Kay 56; 5 De Gex, M. & G. 1; *Barret v. Blagrove*, 5 Ves. 555; *Hardy v. Martin*, 1 Cox, 26. So do cases in which specific performance is decreed, notwithstanding the contract provides for stipulated damages. *Fox v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 10 Jur. (N. S.) 1123. This is perfectly reasonable and equitable; for the penalty, forfeiture or fixed damages are only agreed upon to render it more improbable that the act against which they are directed will be committed.

The cases above referred to sufficiently show that the remedy may be had by and against the assigns of the respective parties, but the following cases may be cited to the same: *Tulk v. Moxhay*, 2 Phill. 774; *Mann v. Stephens*, 15 Sim. 377; *Hills v. Miller*, 3 Paige, 254; *Barrow v. Richard*, 8 Paige, 354; *Brouwer v. Jones*, 23 Barb. 153; *Linzee v. Mixer*, 101 Mass. 512; *Gilbert v. Peteler*, 38 N. Y. 165; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; s. c., 13 Am. Rep. 556. Even a parol agreement, if once executed, may be subsequently enforced in behalf of parties for whose benefit it was intended. *Tallmadge v. East River Bank*, 2 Duer, 614.

That a condition like that in this case is valid in law was decided in *Smith v. Barrie*, 56 Mich. 314; s. c., 56 Am. Rep. 391, at the last term of this court, and is not now in question. A perpetual injunction should be decreed, and complainant should recover his costs.

Injunction decreed.

SHERWOOD and CHAMPLIN, JJ., concurred.

CAMPBELL, J. I think the case is not one for equity.

Thomas v. Caulkett

THOMAS V. CAULKETT.

(87 Mich. 322.)

Contract — public policy — value of medical services.

Where a doctor was employed by one injured in a railway accident to explain his injuries to the company, on the agreement that if \$1,500 should be recovered for the injury, he was to have \$300, and if \$2,000, he should have \$500, *held*, that the agreement was illegal.

ASSUMPSIT for services. The opinion states the case. The plaintiff had judgment below.

Thew & Latta and *W. B. Williams*, for appellant.

Pope & Hart and *Sidney Thomas*, for appellee.

CAMPBELL, J. Plaintiff sued defendant for services in going with him from Allegan to Detroit, and giving his views about defendant's condition, arising out of injuries in a railroad accident upon the Lake Shore & Michigan Southern road. There were some further items for expenses and treatment.

The defendant considered that he had a cause of action for his injuries, and had some correspondence with the company, who would not pay him what he was willing to accept. Finally it was arranged that he should go to Detroit and confer with the counsel of the company, and if necessary be examined. Plaintiff was to go with him, and defendant procured a pass for both. Plaintiff had also a desire to attend a medical commencement. The parties differ in their statements concerning the terms and arrangements.

Plaintiff testified in substance, that having ascertained that defendant was willing to accept \$1,200, although as both testify, he thought he ought to have \$1,500 or more, they had a conference in which it was understood that if defendant received \$1,500 plaintiff should have \$300; if \$2,000, \$500; and in similar way for a larger sum. Plaintiff's employment was to lay the facts before the company's counsel and medical advisers. At Detroit, at plaintiff's suggestion, defendant was examined by another surgeon; and he was also examined by Dr. McLean, the company's surgeon; and a settlement was finally had upon Dr. McLean's report of the case, the amount having been reached by a deduction of defendant's

demand of \$2,500 down to \$1,500. Defendant did all the pecuniary negotiating himself, but plaintiff advised him at different times what to demand, and that he ought to have all that he asked.

The declaration contained a special count and the common counts. Such questions as arose under the special count, as such, were put out of the case by its relinquishment on trial. As the demand for compensation was for money actually due under any contract, if one existed, it was recoverable under the common counts. The verdict of the jury was for an amount which if based on the special contract must have left out items additional, which had testimony to support them. Nevertheless we cannot say as matter of law, that the finding may not have been based on the special agreement to which plaintiff testified. We must therefore treat it as in the case.

Upon the proof of the value of plaintiff's services, apart from any special contract, we do not see that the testimony was improper. It cannot be held, as matter of law, that the value of scientific services depends on a man's actual average daily receipts. If that were so, there could be no room for advancement. A physician's services may be worth much more than this. A jury may properly have before them all the elements which will aid them in forming a judgment, and may, where these elements are various, draw their own conclusions by comparison. The services rendered here were the description and medical interpretation of a serious and somewhat obscure injury, which it seems likely from the testimony of the witnesses required considerable professional skill to perceive and appreciate, and describe clearly. It appears also that the conclusions and descriptions of plaintiff corresponded with those of the other gentlemen who acted in the matter. The value of a physician's services of that kind could not very well be measured by his usual receipts in daily business to such an extent as to exclude opinions of competent men as to their worth.

The only really important question before us is whether the special contract testified to, and on which the jury may have acted, was legally valid. The testimony of defendant, as well as of other witnesses, fails to indicate that plaintiff made any statements which were not accurate. But the contract must be measured by its tendency, and not merely by what was done to carry it out. There is no particular reason to suppose defendant got any more than he should have got. This however is not the test.

Thomas v. Caulkett.

When we come down to the real nature of this alleged contract, it is one which contemplated that plaintiff was to give his view of the facts relating to defendant's physical condition and injuries, as they had existed and been developed under his observation, and the medical bearing of these facts, and the extent of past or future dangers and sufferings. While it is probable, from the medical testimony, that the present condition and future prospects can be got at with considerable certainty, yet it is also possible that some complications may escape detection, and some appearances may be ambiguous, unless explained by previous symptoms or conditions. Beyond this there can be no doubt that suggestions may often be made by one physician which will aid others, to whom they might not have occurred from their own experience or observation. Under these circumstances, it is at least possible, if not probable, that the judgment ultimately formed will depend very much on the facts and opinions and the coloring of the statements furnished by the person relied upon as best informed. He puts himself in a position where both parties are expected to rely upon him, and to act on what he says.

When under such circumstances he makes the disclosure of his knowledge and opinions the subject of a contract, whereby his compensation is to depend on the amount obtained by his employer by reason of the disclosure, it is plain that he puts himself in a position where it is his interest to exaggerate. If he were to explain to those whom he is to influence that he is acting under such an employment, and as a solicitor, then there would be nothing to put him on a different footing than other known agents. But no such explanation was contemplated, and none given. And however honest a man's actual intentions may be, and however truthful he may be, there is a direct temptation to misrepresent, and a direct danger that the misrepresentation will operate injuriously to the parties dealt with. Such secret agreements by persons putting themselves in positions of confidence come within recognized prohibitory rules as tending to defraud. In such cases we cannot expect to find precisely analogous precedents, but the principle is familiar and of long standing. It belongs with the class of combinations to raise prices by biddings at auction, or other devices whereby the illegality is not worked out merely by success, but inheres in the transaction itself, and with those contracts where success is dependent on personal influence and persuasion, having the appearance of disinterestedness.

 People v. Shaw.

Upon this point we think the court erred in not so charging the jury, and therefore the judgment must be reversed, and a new trial ordered.

Judgment reversed.

COOLEY, C. J., and CHAMPLIN, J., concurred.

PEOPLE v. SHAW.

(57 Mich. 408.)

Criminal law — larceny — trick.

The taking of money by confederates on a sham bet contrived by them to defraud a person who advances the money and takes part in the transaction, is larceny.*

CONVICTION of larceny. The opinion states the case.

Moses Taggart, attorney-general, for people.

Frank A. Dean, for appellant.

CAMPBELL, J. Respondents were convicted of larceny from James Brown of \$80 in money, which was accomplished by means of legerdemain with marked cards. The only substantial question before us, worth noticing, is whether the fraudulent transaction, whereby the victim was deprived of his money, came within the definition of that offense. Although he was taken in while trying to aid in performing a sharp trick himself, yet this may not destroy the public wrong if one existed.

Shaw and Jones were confederates in the fraud. Shaw had introduced himself to Brown as a traveller for a tea-dealing firm in Cincinnati, and told him that one of the means for getting custom in a new place was offering purchasers a chance, by drawing cards, to get fifty pounds free, in addition to the purchase, if they drew the winning card. In order to carry out the scheme, he wanted Brown to accompany him, and showed him how to draw the lucky card, by a little dot on the back. While they were practicing, and Brown succeeded each time in drawing the card, Jones came up.

* See *People v. Ray* (66 Cal. 423), 56 Am. Rep. 103.

People v. Shaw.

appearing to be a stranger, and inquired what they were doing, and Shaw told him he would show him, and gave him the same explanation as to the mode of selling tea, but did not tell him about the marked cards. Shaw, after some talk, said that Brown could draw the fifty pound card. Jones offered to bet \$100 that he could not, and he held out to Shaw what seemed to be a roll of bills. Shaw said he had not the money, but had a \$300 check. Jones said he did not want the check; he wanted money. Shaw asked Brown if he had it. Brown said he had not a \$100, but had \$80. Brown, at Shaw's request, handed him the \$80, and Shaw whispered to him to draw the marked card. He drew it and it was a blank, and Shaw at once handed the money to Jones. There were some subsequent performances which indicated the conspiracy between the respondents, but the larceny was charged on these facts, and their purpose. The court below refused to charge the jury that they did not make out larceny. No other part of the general charge is material, as it all rested on an explanation of principles involved in holding that it might be larceny if done with intent to steal. Brown testified that he expected the money to be handed back, and that Shaw would infallibly win. The court, in substance, told the jury that if money is handed over to cover a wager, understanding and expecting that it will not be delivered until won, or honestly won, there is a condition that it shall not be otherwise delivered, and if the wager is fraudulent, and the whole is a swindle, the law holds the condition is not complied with. There was a further charge making the guilt of the parties hinge on their intention, and some cautions were given to the jury against allowing the misconduct of either party to lead them to a disregard of the law. The case does not very clearly show how far the exceptions went, as actually taken, but we shall assume they covered the important question as to the legal quality of the fraud.

There is some rather attenuated discrimination to be found in the books between such cheats as induce a person to give temporary custody of his property to another, who keeps or disposes of it, and those whereby he is induced to part with it out and out. We do not think it profitable to draw over-nice metaphysical distinctions to save thieves from punishment. If rogues conspire to get away a man's money by such tricks as those which were played here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking, and so make the

conversion felonious. We have a statute which provides that an indictment for larceny may include counts for false pretenses, embezzlement and receiving or concealing stolen property, and allowing the jury to convict of either. How. Stat., § 9546. While this will not allow a conviction except for an offense charged, it nevertheless recognizes the kindred nature of these offenses, and indicates a purpose to facilitate dealing with such offenders. In *Robson's* case, Russ. & R. 413, the circumstances were nearly like those in the present case, and where they differed, it was not in a way to negative criminality here. In that case, the person whose money was alleged to have been stolen, was induced to take part in a bet, and put his money in the hands of a stakeholder, who paid it over to the winner. The bet as here was got up by confederates, who played into each other's hands, and one of whom persuaded the victim that the bet was certain. They were convicted of larceny, and the trial judge who allowed the conviction, reserved the point for the opinion of the judges, ten of whom met and agreed in sustaining the conviction, because at the time of taking, the owner only parted with the possession of the money. As the opinions are not reported, it can only be inferred that the judges thought there was no *bona fide* wager which made the stakeholder any thing more than the temporary bailee, and therefore the transfer and acceptance by the apparent winner were unauthorized, and operated as a felonious taking. The case is substantially like this, except that Brown made no bet, but handed his money to Shaw on the belief that there was a real bet between him and Jones. Brown himself deserves no special favor for undertaking to facilitate Shaw's knavery. But this does not help respondents, whose methods consisted in tempting weak fools into confiding in their superior cunning. Their offense is the same as if Brown had been altogether virtuous. They used just so much trickery as was necessary to get his money on a sham bet, and that was enough, as we think, to bring them within the law.

The judgment must be affirmed.

Judgment affirmed.

The other justices concurred.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

SMITH V. MYERS

(100 Ind. 1.)

Constitutional law — jurisdiction — as to delivery of election returns.

Where election returns, as required by law, are directed to the speaker of the house of representatives, in care of the secretary of State, and are to be delivered by the secretary to the speaker, injunction will not issue to restrain the secretary from delivering them, on the allegation that they are wrongful and illegal.

SUIT for injunction. The opinion states the case.

D. Turpie, J. B. Brown, J. W. Gordon and J. C. F. Gordon,
for appellant.

L. T. Michener, attorney-general, *W. H. H. Miller* and *S. J. Peelle,* for appellee.

ELLIOTT, C. J. Stripped of unnecessary verbiage, and exhibited in a condensed form, the material allegations of the complaint are these: That the appellant was qualified to hold the office of senator in the general assembly of the State; that he was elected to that office on the 7th day of November, 1884, for the term of four years, and still remains in office; that on the 13th day of April, 1885, he

was chosen president of the senate of Indiana, accepted that position, and still holds it ready, willing and qualified to discharge its duties; that on the 7th day of November, 1884, Mahlon D. Manson was elected to the office of lieutenant-governor, for the term of four years, and that his term of office began on the second Monday in January, 1885; that Mahlon D. Manson vacated the office to which he was elected in July, 1886, by accepting the office of collector of internal revenue for the seventh district of Indiana; that by reason of the vacancy created by the acceptance of the Federal office by Lieutenant-Governor Manson, the appellant is, to quote literally from the complaint, "entitled to discharge the duties of said office as required and provided by the Constitution and laws of the State of Indiana, and to receive the pay and emoluments of the said office;" that on the 2d day of November, 1886, a general election was held in the State of Indiana, and four persons procured themselves to be voted for by the electors of the State as candidates for the office of lieutenant-governor; that at the proper time these votes were canvassed by the election officers, and on the day following the canvass in all the counties of the State, the clerks of the respective counties did make out certificates, duly signed and sealed, and did forward them by mail to Indianapolis, addressed to the speaker of the house of representatives of the State of Indiana, in the care of William R. Myers, the appellee, as secretary of State; that the secretary of State, William R. Myers, received in due course of mail the sealed packages transmitted to him by the clerks of the several counties of the State, and that he now has custody of the sealed packages, and threatens to deliver them to the speaker of the house of representatives, and that he will so deliver them unless enjoined by the court; that the certificates and returns contained in the sealed packages, of which the secretary of State has possession, are wrongful and illegal; that, to again quote from the complaint, the said William R. Myers ought not to be permitted "to deliver the same to the speaker of the house of representatives, thereby assisting in casting a cloud upon the right and title of the plaintiff to discharge the office of lieutenant-governor." The prayer of the complaint is, "that the said William R. Myers, secretary for the State of Indiana, as aforesaid, be perpetually enjoined from delivering the sealed packages in his possession to the speaker of the house of representatives."

 Smith v. Myers.

The question which faces us at the threshold is one of controlling influence, and the answer to it must rule our decision. The question of jurisdiction is always one of importance, but in no case is it more important than where, as here, the extraordinary remedy of injunction is invoked to control the acts of officers holding high places in the government of the State. In cases like this, where the judicial department is asked to enjoin an officer of a different branch of the government from performing an official act, the question is always one of dominating force, and sometimes of perplexing difficulty. On the one hand, no consideration of policy or convenience should induce the courts to assume to exercise a power that does not belong to them, nor, on the other hand, should any consideration of that kind, or of any kind, induce them to surrender a power which it is their duty to exercise. The assumption of a power not vested in them would be a violation of the Constitution, since it would be an usurpation of a power conferred upon another branch of the government. It would disturb the system of checks and balances which the Constitution has so carefully constructed, and which the courts have ever guarded with most scrupulous care. The question is as important as any that the courts encounter in the whole range of judicial investigation, and it is always regarded as one of great delicacy, to be considered with care and disposed of with caution. The question of jurisdiction is never in any case a technical or subordinate one, and certainly it is not so in the one before us.

It often becomes a question in cases of the general class to which the present belongs, whether a suit for injunction can be maintained in any case where the title to a public office is involved, and by many courts it is held that in such cases there is no jurisdiction. *Foster v. Moore*, 32 Kans. 483; *Gilroy's Appeal*, 100 Penn. St. 5; *Stone v. Wetmore*, 42 Ga. 601; *Kilpatrick v. Smith*, 77 Va. 347; *Jones v. Commissioners, etc.*, 77 N. C. 280; *Patterson v. Hubbs*, 65 N. C. 119; *Moulton v. Reid*, 54 Ala. 320; *Beebe v. Robinson*, 52 Ala. 66; *People v. Draper*, 24 Barb. 265; *Planters' Com. Ass'n v. Hanes*, 52 Miss. 469; *Sheridan v. Colvin*, 78 Ill. 237; *People v. Forquer*, Breese (Ill.), 104; *Hulseman v. Rens*, 41 Penn. St. 396; *Commonwealth v. Baxter*, 35 Penn. St. 263; *State v. Governor*, 1 Dutch. (N. J.) 331; *Peck v. Weddell*, 17 Ohio St. 271; *Ingerson v. Berry*, 14 Ohio St. 315; *Markle v. Wright*, 13 Ind. 548; *Beal v. Ray*, 17 Ind. 554.

But the case before us is narrowed to a small compass by the provisions of our Constitution and our statute, and it is unnecessary for us to enter into the broad field covered by the cases to which we have referred. We abstain, therefore, from any discussion of the general doctrine declared by those cases. Nor do we deem it necessary to determine the relation of the remedy of mandamus to that of injunction, for it is not necessary to a decision of the ruling question as it is here presented; nor is it necessary to determine whether the title to an office may be tried in an action for mandamus. All that we are required to decide, all that it is proper for us to decide, and all that we do decide is, that injunction will not lie in such a case as the one presented to us by the record.

The Constitution of the State provides that "The returns of every election for governor and lieutenant-governor shall be sealed up and transmitted to the seat of government, directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the General Assembly." Art. 5, § 4. The provisions of our statute are: "Each clerk of the Circuit Court shall, on the day following the return day of an election for governor and lieutenant-governor, make out, at full length, two certified statements, under the seal of his court, of the number of votes each candidate received; one of which he shall transmit to the speaker of the house of representatives of the next general assembly, by his senator or representative, who shall deliver the same to such speaker on or before the second day of the session, and the other certified statement shall be transmitted by mail to Indianapolis, directed to said speaker, and to the care of the secretary of State, by whom the same shall be delivered to the speaker on or before the second day of the session." R. S., 1881, § 4729.

It appears from these constitutional and statutory provisions, that the papers sent by the clerks of the counties of the State to Indianapolis, addressed to the speaker of the house of representatives, in the care of the secretary of the State, are in the hands of the secretary as a mere custodian, charged with the duty of delivering them to the speaker of the house of representatives. Nothing that the secretary can do can give validity to the papers if they have none by force of law, and nothing he can do can deprive them of validity if under the law they are valid. If the secretary may be enjoined from performing the imperative duty cast upon him by

Smith v. Myers.

law, then, upon like reasoning, so may the clerks of the counties, and the members of the general assembly, to whom duplicates of such papers are entrusted for delivery to the officer to whom they are addressed, and to whom the law declares they shall be delivered. We doubt whether papers directed by law to be delivered to a designated officer can, in any case, be stopped by injunction in the hands of a mere custodian charged by law with the duty of delivering them; but however this may be, we are clear that they cannot be stopped by injunction in the hands of the custodian in such a case as that which this record presents to us. If the courts should enjoin the secretary of State, no substantial result would be accomplished, because duplicates of the papers in his custody are in the hands of members of the general assembly, who are charged by law with the duty of delivering them to the speaker to whom they are addressed, and the courts cannot enjoin legislators from performing a duty cast upon them by the law. Decrees of courts in injunction cases can only be enforced by punishing, by fine or imprisonment, those who disregard them, and it cannot be true that courts can fine or imprison legislators for doing what the law directs them to do. It is a general principle, well grounded in reason and firmly established by authority, that courts will not issue writs of injunction in cases where they would be unavailing, and a writ would be unavailing here, for the courts cannot inflict punishment upon officers for doing what the law commands them to do.

It is a principle of constitutional law, declared in our Constitution, and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant. The general assembly has power to compel the attendance of persons at its sessions, and to compel the production of papers which are necessary to enable it to justly and intelligently discharge its duties and exercise its functions. If the judiciary should enjoin the secretary of State from delivering to the speaker the papers described in the complaint, and the general assembly should demand their delivery to the officer to whom they are addressed, a conflict of authority would arise which no tribunal could effectually determine. If the secretary should in such

a case yield to the demand of the general assembly, he would be in contempt of the authority of the court, and liable to punishment; if, on the other hand, he should disobey the command of the general assembly, he would be in contempt of its authority, and subject to punishment. If the general assembly should deem it the duty of the secretary of State to deliver the papers, it would not require the aid of the courts to compel its performance, for it possesses the power to coerce the production of papers and documents. Rev. Stat. 1881, § 4736.

There is, we know, some conflict in the cases as to whether the legislature possesses the general inherent power to punish for contempt; but it is agreed without substantial diversity of opinion, that it may make and enforce orders for the production of papers in matters in which it has power to act. *Anderson v. Dunn*, 6 Wheat. 204; *Kilbourn v. Thompson*, 103 U. S. 168; *Mariner v. Dyer*, 2 Greenl. 165; *Yates v. Lansing*, 9 Johns. 395; s. c., 6 Am. Dec. 290; *United States v. Hudson*, 7 Cranch, 32; *Tenney's case*, 23 N. H. 162; *State v. Copp*, 15 N. H. 212; *Ex parte Dalton*, 5 N. E. Rep. 136.

It is apparent therefore, that as, on the one hand, the general assembly would not require the aid of the courts, by *mandamus* or otherwise, to compel the production of papers addressed, by direction of the Constitution and the statute, to the presiding officer of one of its branches, so on the other hand, the courts can not by injunction restrain it from obtaining those papers, nor by indirection produce that result by stopping them in the hands of one whom the law makes a mere custodian.

Many cases assert that courts cannot control by injunction, or by any other writ, the exercise of a purely legislative or executive power. *Vicksburg v. Lowry*, 61 Miss. 102; s. c., 48 Am. Rep. 76; *Hawkins v. Governor*, 1 Ark. 570; s. c., 33 Am. Dec. 346; *State v. Drew*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 360; *People v. Bissell*, 19 Ill. 229; s. c., 68 Am. Dec. 591; *People v. Yates*, 40 Ill. 126; *State v. Warmoth*, 22 La. Ann. 1; *In re Dennett*, 32 Me. 508; *Rice v. Austin*, 19 Minn. 103; s. c., 18 Am. Rep. 330; *State v. Governor*, 39 Mo. 388; *Mauran v. Smith*, 8 R. I. 192; s. c., 5 Am. Rep. 564; *Turnpike Co. v. Brown*, 8 Baxt. 490; s. c., 35 Am. Rep. 713; *Houston, etc., Ry. Co. v. Randolph*, 24 Tex. 317; *City of Chicago v. Evans*, 24 Ill. 52; *Smith v. McCarthy*, 56 Penn. St. 359; *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa. 505; s. c., 24 Am. Rep. 756.

Smith v. Myers.

The principle which underlies the decisions is well stated by our own court in *Wright v. Defrees*, 8 Ind. 298, where it was said: "The powers of the three departments are not merely equal; they are conclusive, in respect to the duties assigned to each. They are absolutely independent of each other."

In other cases this principle has been asserted and enforced. *Little v. State*, 90 Ind. 338; s. c., 46 Am. Rep. 224, and cases cited; *Gregory v. State*, 94 Ind. 384; s. c., 48 Am. Rep. 162; *Butler v. State*, 97 Ind. 373.

To stay papers addressed to the presiding officer of one of the branches of the legislature in the hands of a mere custodian, would be an invasion of this doctrine, and one that might produce a serious conflict between the judicial and legislative departments of the government. In refusing to interfere by injunction, the court neither decides that the papers are of legal force, nor determines what disposition can be legally made of them, for it simply declines to interfere by injunction, because it has no jurisdiction to award such a writ.

The question is one of jurisdiction over the subject-matter, and jurisdiction of the subject-matter comes from the law alone. It is perfectly clear in reason and upon authority that no man can invest the courts with jurisdiction of the subject-matter. The law alone can do this.

In giving judgment upon a case very like the present in principle, the Supreme Court of Minnesota said: "An executive officer can not surrender the defenses which, not for his, but for the public good, the Constitution has placed around his office. Still less can his consent authorize this court to transgress the constitutional limitation of its powers, and assume a jurisdiction, which by the fundamental law, it is forbidden to exercise." *County Treasurer v. Dike*, 20 Minn. 363.

There are well-reasoned cases that go so far as to hold that the legislature itself cannot invest the judicial department of the government with authority to assume jurisdiction over the legislative or executive departments. *Sterling v. Drake*, 29 Ohio St. 457; s. c., 23 Am. Rep. 762; *State v. Nichols*, 26 Ark. 74; s. c., 7 Am. Rep. 600; *State v. Sloss*, 25 Mo. 291; s. c., 69 Am. Dec. 467; *Attorney-General v. Brown*, 1 Wis. 513; *Haley v. Clark*, 26 Ala. 439.

This is indeed the principle asserted in *Butler v. State*, *supra*, where it was held that the legislature could not confer upon the

Winchester Wagon Works and Manufacturing Company v. Carman.

courts the authority to pardon or reprieve persons convicted of crime, as that power is conferred upon the governor by the Constitution of the State.

It is a rudimentary principle, acted upon again and again, that when it is ascertained that there is no jurisdiction, courts will go no further. It would not only be a vain and fruitless thing to assume to decide a question when there is no jurisdiction, but it would be a mischievous thing, because it would give an appearance of authority to that which is utterly destitute of force. Such a decision would be the merest shadow of authority, binding nobody. *People v. Walter*, 68 N. Y. 403, see p. 411; *Weeden v. Town Council*, 9 R. I. 128.

It is laid up among the earliest principles of the law, that a decision, where there is no jurisdiction, is absolutely and incurably void. This principle frequently finds expression, although not always accurately or elegantly in the statement, so often found in the books, that "such a judgment is *coram non judice* and void." But one result can be reached, either on principle or authority, and that is that the courts have no jurisdiction to entertain this suit.

Judgment affirmed.

WINCHESTER WAGON WORKS AND MANUFACTURING COMPANY V.
CARMAN.

(100 Ind. 31.)

Sale — by wholesale to retail dealer — condition that title shall remain in vendor until payment — when fraudulent and void.

When a manufacturer and wholesale vendor of wagons sells upon credit and delivers them to a retail dealer for the apparent and implied purpose of resale, a condition that the title shall remain in the vendor until the purchase-price is paid, is fraudulent and void as against a purchaser from the vendee. (See note, p. 386.)

ACTION to recover wagons. The opinion states the case. The defendant had judgment below.

T. J. Study, W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellant.

H. U. Johnson and P. J. Freeman, for appellee.

Winchester Wagon Works and Manufacturing Company v. Carman.

Howk, J. This was a suit by the appellant to recover the possession of two wagons of the value of \$127, of which, as alleged, it was the owner and entitled to the possession; and further it was alleged, that appellee had possession of such wagons without right or title, and unlawfully and wrongfully detained the same from appellant. Wherefore, etc.

The cause was tried by a jury, and a verdict was returned for appellee, the defendant below; and over appellant's motion for a new trial, the court rendered judgment for appellee upon and in accordance with the verdict.

The only error assigned here by the appellant is the overruling of its motion for a new trial.

The facts of this case were substantially as follows: On, and for some time prior to the 29th day of July, 1884, appellant was and had been engaged in the manufacture of wagons and in the sale thereof at wholesale to retail dealers therein. On, and for some time before the day last named, one J. B. Stewart was and had been a retail dealer in wagons and other implements, and a customer of the appellant. On the day last named, pursuant to a written contract therefor entered into, appellant sold and delivered to said J. B. Stewart, at College Corner, Ohio, "a car load of twenty wagons," for the aggregate sum of \$1,287.50, payable in three installments, evidenced by Stewart's three notes to the appellant maturing respectively on the 29th day of November, 1884, and on the 29th days of January and March, 1885. It was stipulated in such written agreement, and in each of Stewart's three notes, that the title to the car load of wagons should remain in appellant until such notes were fully paid. The two wagons, which are in controversy in this action, were a part of such car load of wagons so sold and delivered by appellant to J. B. Stewart, and were by him sold and delivered in January, 1885, to one Benjamin Wolverton, who, "several days afterward," sold them to appellee. In consideration of the sale of the two wagons to him, Wolverton sold and conveyed to said J. B. Stewart three hundred and twenty acres of land in Reynolds county, Missouri. Afterward J. B. Stewart sold and conveyed the same Missouri land to the appellant, with full knowledge on its part that all that Stewart ever gave for such land was the two wagons, of which it now claims to be the owner in this action. Appellant took the conveyance of such land, at the agreed price of \$480, and with Stewart's consent gave him credit for that amount

Winchester Wagon Works and Manufacturing Company v. Carman.

on an old debt, which he owed appellant for other wagons sold and delivered by it to him prior to its sale and delivery as aforesaid of such "car load of twenty wagons." After appellant obtained its deed for such Missouri land, it commenced this suit against appellee to recover the possession of the two wagons which Stewart gave for such land.

At appellee's request, the trial court instructed the jury that if they found the facts of this case to be substantially as we have stated them, "the plaintiff cannot recover said two wagons from defendant in this action, even though said Wolverton knew at the time he traded such land for the two wagons that the title to such wagons was in plaintiff, and even though plaintiff and said Stewart, at the time plaintiff took a deed of such land to itself, applied the same upon an existing indebtedness of said Stewart to the plaintiff other than the purchase-money for said two wagons."

The trial court refused to instruct the jury when requested by appellant, as follows:

"If the wagons in controversy were sold by the plaintiff to one J. B. Stewart, on or about the 29th day of July, 1884, upon the express condition that the title to the wagons should remain in plaintiff until the purchase-price, which Stewart agreed to pay for the same, should be paid, and if said Stewart afterward, without the consent of plaintiff and without the wagons having been paid for, traded such wagons to one Wolverton for certain land in the State of Missouri, and thereafter said Wolverton traded or sold such wagons to the defendant without the consent of plaintiff, and without the purchase-price which Stewart agreed to pay plaintiff for said wagons having been paid, the fact that plaintiff accepted a conveyance of such land from said Stewart, but not in satisfaction of nor in payment upon the amount which Stewart agreed to pay plaintiff for said wagons, did not estop nor deprive plaintiff of the right to recover said wagons from the defendant."

Appellant also requested the court to give the jury another instruction, which was refused; but as it does not differ in substance or in legal effect from the instruction last quoted, we need not set out such other instruction in this opinion.

It is claimed by appellant's counsel, that the court below erred both in giving the instruction requested by appellee, and in refusing to give the instructions asked for by appellant; and these alleged errors of law were assigned by it as causes for a new trial

Winchester Wagon Works and Manufacturing Company v. Carman.

in its motion therefor. These errors of law fairly present for our decision what we regard as the controlling question in this case, namely: Upon the facts shown by the evidence, as we have stated them, was appellant's conditional sale of the car load of wagons to J. B. Stewart valid and binding, or was the condition fraudulent and void as against the appellee?

The law seems to be well settled in this State, that where the owner of personal property sells and delivers it to a purchaser, not for the purpose of consumption or resale, at an agreed price, payable at a future day, upon the express condition and agreement that the title to such property should remain in the vendor thereof until the purchase-price was fully paid, the vendee of such property, prior to such payment, can neither sell nor encumber the property in such manner as to defeat the title of the original owner and vendor thereof. *Thomas v. Winters*, 12 Ind. 322; *Dunbar v. Rawles*, 28 Ind. 225; *Bradshaw v. Warner*, 54 Ind. 58; *McGirr v. Sell*, 60 Ind. 249; *Domestic S. M. Co. v. Arthurhultz*, 63 Ind. 322; *Payne v. June*, 92 Ind. 252; *Lanman v. McGregor*, 94 Ind. 301; *Baals v. Stewart*, 109 Ind. 371.

But where as here it appears that a manufacturer and wholesale vendor of articles of personal property sells upon credit, and delivers a lot of such articles to a retail dealer therein, for the apparent or implied purpose of resale by such vendee, it is clear we think that the doctrine in relation to conditional sales cannot apply to or govern such a sale in a controversy as to such article between the original vendor and the purchaser thereof from the original vendee. For in such case the purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition upon which the sale and delivery were made must be deemed fraudulent and void as against purchasers from the original vendee of the property.

In *Devlin v. O'Neill*, 6 Daly, 305, it was held that a sale of goods to be disposed of by vendee at retail cannot be conditional, and that an attempt to make it conditional is fraudulent and void as to creditors of the vendee. So also in *Ludden v. Hazen*, 31 Barb. 650, it was held by the Supreme Court of New York, that a conditional sale of goods to be resold by the vendee at retail was fraudulent as against purchasers and creditors, and that the form of the transaction should be deemed to be colorable, and the

Winchester Wagon Works and Manufacturing Company v. Carman.

title held to have vested absolutely in such vendee. See also *Griswold v. Sheldon*, 4 N. Y. 581, 591; Benj. Sales (3d Am. ed.), § 319, note c.

We are of opinion therefore that upon the facts shown by the evidence in the case under consideration, the title to the two wagons in controversy herein must be held as between the appellant and appellee, to have vested absolutely in said J. B. Stewart, and that for this reason the verdict of the jury in appellee's favor was clearly right.

[Minor points omitted.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *Ludden v. Hasen*, 81 Barb. 650, ALLEN, J., said: "But where the purpose for which the possession of the property is delivered to the buyer is inconsistent with the continued ownership of the claimant, the transaction will be presumed fraudulent as against purchasers and creditors. The form of the transaction will be deemed to be colorable, and title held to have vested absolutely in the buyer. But the principle of conditional sales, aside from the fraud, which is very apparent, will not uphold such sale when the property is to be delivered to the buyer for consumption or for sale, or to be dealt with in any manner inconsistent with the ownership of the seller, or in any manner which would necessarily destroy his lien or right of property." The case here was "the running of an unlicensed grocery upon borrowed whisky," which the court pronounced "a new expedient to violate the laws and avoid pecuniary responsibility."

The same was held in *Fitzgerald v. Fuller*, 19 Hun, 180, when it said, that "if a man, owning property, delivers it to a third person, and sends him forth to sell it and receive pay for it, no secret agreement between the former and him can affect the right and title of a purchaser from him, who buys in good faith, without notice of their agreement, and pays full consideration."

See *Lewis v. McCabe*, 49 Conn. 140; s. c., 44 Conn. 217, to the contrary of the principal case.

In *Rogers v. Whitehouse*, 71 Me. 223, it was held that title in such a case would not pass to the buyer's assignee in insolvency, but it is said, *obiter*, that *bona fide* purchasers at retail would get title; and substantially the same in *Burbank v. Crooker*, 7 Gray, 158; s. c., 66 Am. Dec. 470.

Armington v. Houston, 88 Vt. 448, the sale was of groceries for family consumption, to maintain the property of the plaintiff till paid for. *Held*, that the buyer's creditors could not attach them. The court said: "It would be no more than a privilege to use and consume the goods as the plaintiff's property, and not as the property of Thompson," the buyer. The court distinguishes *Ludden v. Hasen*, *supra*, on the ground of "a material distinction between a general and unrestricted power to sell and dispose of property and a limited privilege to consume it," and admit that in the former case "the seller would be estopped from asserting any right to it adverse to the right of one who should purchase it in good faith and without notice of the condition."

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

In *Sargent v. Metcalf*, 5 Gray, 806; s. c., 66 Am. Dec. 868, the sale was to a retail dealer, but on condition that he was not to sell until he paid. *Held*, that a purchaser from him got no title.

In *Leigh v. Mobile & Ohio R. Co.*, 58 Ala. 165, the court said: "Another class of cases forming an exception to the general rule, is, when the owner, by his own act or consent, has given another such evidence of the right to sell, or otherwise dispose of his goods, as according to the customs of trade, or the common understanding of the world, usually accompanied the authority of sale, or of disposition. Then, if the person entrusted with the possession of the goods, and with the *indicia* of ownership, or of authority to sell or otherwise dispose of them, in violation of his duty to the owner, sells to an innocent purchaser, the sale will prevail against the right of the owner. He ought to bear the loss which may follow him from his misplaced confidence, rather than the *bona fide* purchaser, who relied on the evidence of property, or of authority with which he clothed the possessor."

INDIANAPOLIS, PERU AND CHICAGO RAILWAY COMPANY V. PITZER.

(100 Ind. 179.)

Carrier — putting infant trespasser off train.

A boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward, in the day-time, on an ascending grade, where it could easily have been stopped, ran upon and killed the child. *Held*, that the railroad company was liable.

ACTION for negligently killing plaintiff's minor son. The opinion states the case. The plaintiff had judgment below.

C. B. Stuart and W. F. Stuart, for appellant.

J. W. Kern, J. C. Blackledge, W. E. Blackledge and B. O. H. Moon, for appellee.

ELLIOTT, C. J. The material allegations of the appellee's complaint are these: That the son of the appellee, aged seven years and two months, without the fault or negligence of his parents, wan-

dered to the depot of the appellant, in the city of Kokomo, and was carelessly and negligently permitted to get on one of the passenger trains which stopped for five minutes at that depot; that the child was carried to Jackson station; that the conductor of the appellant's train "wrongfully, carelessly and negligently put the child, Arthur Pitzer, off at that station, without leaving him in charge of any person, or giving any one instructions concerning him;" that the conductor well knew that Arthur Pitzer had been carried to that point through the carelessness and negligence of the agents and employees of the defendant; that the child, having been thus wrongfully put off the train at Jackson station, without being placed under the control or in the charge of any person, and without the fault or neglect of his parents, was casually upon the track of the defendant at a point on the line thereof, at or near where a highway crossed it, about one and one-fourth miles north of Jackson station; that at that point, between the hours of four and five o'clock, P. M., he was run over and killed by a freight train of the appellant; that although he was on the track at a place where he could be seen, and was seen by the trainmen for a distance of three-fourths of a mile, no signals of warning were given, but without such signals, and without any effort to stop the train, the employees of the defendant ran the train upon him, although there was an ascending grade, and the train could easily have been stopped.

We regard it as quite clear that the appellant was not in fault for allowing the child to get upon the train. If in any event a railroad company could be made liable for carelessly permitting a person, young or old, to get upon one of its passenger trains, it cannot be made liable in such a case as that stated by the complaint. It does not appear that the child was not, so far, at least, as the servants of the appellant could observe, in company with adult persons who entered the train at the city of Kokomo, nor does it appear that the appellant's employees knew, or could have known, that he had no right to take passage. We suppose it to be perfectly clear that a child of tender years may enter a railroad train without subjecting the company to the charge of negligence, and that the mere failure to keep a child off the train will not supply a foundation for an action. We know of no principle that requires railroad companies to keep watch to prevent persons, young or old, from entering their passenger trains at a regular station. If in any case of this character a railroad company can be made liable for

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

allowing a child to enter one of its passenger trains, it can only be a case where facts are stated showing that it was wrong to permit the child to get upon the train, and here there are no such facts pleaded. We conclude therefore that the mere fact that the child was permitted to enter the passenger train creates no cause of action against the appellant, for he entered the train as an intruder. Intruders, infants or adults, cannot, as a general rule, impose any duties upon the person on whose property they intrude. *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323; s. c., 41 Am. Rep. 572; *Everhart v. Terre Haute, etc., R. Co.*, 78 Ind. 292; s. c. 41 Am. Rep. 567; *State v. Harris*, 89 Ind. 363; s. c., 46 Am. Rep. 169, see p. 366; *Nave v. Flack*, 90 Ind. 205; s. c., 46 Am. Rep. 205, see p. 206; *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 221; s. c., 50 Am. Rep. 783; *Hestonville, etc., Ry. Co. v. Connell*, 88 Penn. St. 520; s. c., 32 Am. Rep. 472; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; s. c. 30 Am. Rep. 686; *Gavin v. City of Chicago*, 97 Ill. 66; s. c., 37 Am. Rep. 99; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555; *Snyder v. Hannibal, etc., R. Co.*, 60 Mo. 413; *Zoebis v. Turbille*, 10 Allen, 385; *Brown v. European, etc., Ry. Co.*, 58 Me. 384; *Baltimore, etc., R. Co. v. Schwindling*, 101 Penn. St. 258; s. c., 47 Am. Rep. 706; *Atchison, etc., R. Co. v. Flinn*, 24 Kans. 627.

These cases are to be discriminated from those in which one places dangerous agencies where trespassing children are likely to be injured by them; for here the company did what it was perfectly lawful for it to do, and that was to run a passenger train in the manner in which such trains are usually managed. The class of cases to which we refer, although numerous, have no application here. Of this class the following are representative cases. *Binford v. Johnston*, 82 Ind. 426; s. c., 42 Am. Rep. 508; *Dixon v. Bell*, 5 M. & S. 198; *Lynch v. Nurdin*, 1 Q. B. 29; *Carter v. Towne*, 98 Mass. 567; *Railroad Co. v. Stout*, 17 Wall. 657; *Bird v. Holbrook*, 4 Bing. 628; *Birge v. Gardner*, 19 Conn. 507; s. c., 50 Am. Dec. 261; *Keffe v. Milwaukee, etc., Ry. Co.*, 21 Minn. 207; s. c., 18 Am. Rep. 393; *Nagel v. Missouri, etc., Ry. Co.*, 75 Mo. 653; s. c., 42 Am. Rep. 418; *Evansich v. Gulf, etc., Ry. Co.*, 57 Tex. 126; s. c., 44 Am. Rep. 586; *Townley v. Chicago, etc., Ry. Co.*, 53 Wis. 626; *Bransom v. Labrot*, 81 Ky. 638; s. c., 50 Am. Rep. 193; *Kansas, etc., Ry. Co. v. Fitzsimmons*, 22 Kans. 686; s. c., 31 Am. Rep. 203.

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

The cases last cited all recognize the rule that children of tender years are not to be treated as persons of mature years. This is a reasonable and humane rule, and any other would be a cruel reproach to the law; but the law merits no such reproach, for throughout all its branches, whether of tort or contract, there runs, like the marking red cord of the British navy, a line distinguishing children of years too few to have judgment or discretion, from those old enough to possess and exercise those faculties. This is a doctrine taught by every man's experience, and sanctioned by our law. A departure from it would shock every one's sense of justice and humanity. Cases very closely resembling the present recognize and enforce this distinction, and without substantial diversity of opinion the general principle is recognized, although there is not entire uniformity in its application. Dr. Wharton, in discussing the general subject, says: "The protection of the helpless from spoliation is one of the cardinal duties of Christian civilization; and when those so helpless are young children, this duty is aided both by the instincts of nature and the true policy of the State." Whart. Neg., § 313. Mr. Thompson says: "The general rule is, that where the injury is caused by the actual negligence of the company, the child can be expected to use discretion only in respect of its years; and the total incapacity of a child to know the danger, and avoid it, shields it from responsibility for its acts. Greater care, therefore, must be exercised in reference to children than to adults." 1 Thomp. Neg. 452. Another author says: "When the trespasser is an infant, the railway company, on the one hand is held bound to exercise a higher degree of care and caution than is required as to adults, and the infant, on the other hand, is not required to exercise a discretion and prudence beyond its years, but only that measure of sense and judgment which it may reasonably be expected to possess in view of its age." Beach Cont. Neg., 211. Cases in great numbers might be collected supporting the general doctrine declared by these authors, and applying it to almost every conceivable phase of the question, but we deem it unnecessary to cite these cases, as there is little, if any, diversity of opinion. The principle of which we are speaking supplies the initial proposition for this discussion, since it enables us to declare that the conductor was bound to use much greater care in dealing with a child of seven years than he would have been required to exercise respecting an older person. The care exercised by him was not such as under the

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

circumstances it was his duty to exercise. Expelling from the train, miles from its home, a child so young as to be incapable of taking care of itself, or of comprehending the danger of its situation, without asking any one to give it attention or look after its safety, was not such care as humanity and justice require; but we do not place our decision upon this point alone, for we think that the conductor's want of care must be taken in conjunction with the wrong of the engineer and those in charge of the freight train in negligently failing to stop the train when it was within their power to do so before it ran upon the child. These two leading facts, when combined, make a case establishing negligence on the part of the appellant, and excluding contributory negligence on the part of the child. We cannot undertake to comment upon all of the many cases which declare principles that rule such cases as this, but we deem it not unprofitable to refer to some of the decisions which light our way to a just conclusion.

In *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624; s. c., 50 Am. Rep. 186, a man, so drunk as to be helpless mentally and physically, was put off a railroad train, on a cold winter night, by a conductor who knew his condition. The passenger so ejected from the train was severely frozen, and in a very strongly-reasoned opinion the company was held liable. The doctrine of this case is perhaps an extreme one, and to be carefully limited, yet it is not easy to answer the reasoning of the court or meet the force of the authorities cited.

In our own case of *McClelland v. Louisville, etc., Ry. Co.*, 94 Ind. 276, the company was held to be not responsible for the killing of a drunken man who was put off the train and wandered back upon the track and was killed; but the theory upon which that case was decided hardly meets the question as presented in this case, or in *Louisville, etc., R. Co. v. Sullivan*, *supra*. for the facts are not the same in the two cases.

The court in the case of *Atchison, etc., R. Co. v. Weber*, 33 Kans. 543; s. c., 52 Am. Rep. 543, approved this instruction: "Of course the carrier is not required to keep hospitals or nurses for sick or insane passengers, but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity toward him until some suitable provision may be made." And it was held that it was proper for the carrier to transport a passenger suffering from

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

delirium tremens to one of its stations, and there place him in charge of the overseer of the poor.

Discussing a question somewhat similar to that involved in the cases cited, the Supreme Court of Ohio said: "It might perhaps as far as this case is conceded that if a man were so intoxicated as to be without reason, sense, or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the rails and go to sleep. We may concede further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact." *Railway Co. v. Valleley*, 32 Ohio St. 345; 30 Am. Rep. 601.

These are cases, extreme ones it may be, illustrating the doctrine that regard must be had to the helpless condition of one who enters a railroad train, and that those in charge of the train must do no act which is cruel or inhuman. Granting that these cases are extreme ones, still the general doctrine which they assert is undeniably a sound one, for through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another's helplessness. *Weymire v. Wolfe*, 52 Iowa, 533; *Northern Central Ry. Co. v. Slate*, 29 Md. 420; *Walker v. Great Western Ry. Co.*, L. R., 2 Exch. 228; *Swazey v. Union Manfg. Co.*, 42 Conn. 556; *Atlantic, etc., R. Co. v. Reisner*, 18 Kans. 458; *Marquette, etc., R. Co. v. Taft*, 28 Mich. 289 (Opinion of COOLEY, J.); *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358; s. c., 49 Am. Rep. 752.

This principle supplies a solid foundation for the rule that the age of a child is an important element to be considered in determining whether the person who injured him was negligent, as well as in determining whether the child himself was guilty of contributory negligence. We know that there are many cases which hold, and right'y hold, that children may be guilty of negligence. *Hulthway v. Toledo, etc., Ry. Co.*, 46 Ind. 25; *Higgins v. Jeffersonville, etc., R. Co.*, 53 Ind. 110; 2 Wood Ry. Law, 1272, 1273.

A child's age and helplessness may however often excuse where one of mature age would be adjudged in fault, and may also often make an act negligent as to him that would not be so as to one of riper years. It is upon this principle that a recent writer — who

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

fortifies his assertion by many cases—is sustained in saying: “But there is no presumption that a young child or a drunken person will heed the signals of danger, and the engineer is bound to stop the train if he sees that they make no attempt to leave the track.” 2 Wood Ry. Law, 1268*n*.

Doubtless the rule is to be very guardedly applied to one who voluntarily incapacitates himself, since he himself is guilty of a wrong not easily palliated, and it is not easy for an engineer to distinguish a drunken man from a sober one; but with respect to a child of seven years of age it is far otherwise, for nature has incapacitated it, and the engineer can readily distinguish from his stature and appearance the difference between it and a person who has attained years of discretion. Illustrating the subject we are discussing, is a decision by a court which has applied with as much strictness as any in the land the law against children, wherein it was held that negligence could not be imputed to a boy nine years of age who had climbed through a train of freight cars and was injured. *Pennsylvania Co. v. Kelly*, 31 Penn. St. 372. In another case in that court it was said: “He acted like a child and like a child he must be judged.” *Rauch v. Lloyd*, 31 Penn. St. 358. In still another case in that court it was held, that where a boy was carried against his will for five miles, and in returning home received injury, the wrong-doer must respond in damages. *Drake v. Kiely*, 93 Penn. St. 492. The case of *Lovett v. Salem, etc., R. Co.*, 9 Allen, 557, decides that a railroad company is liable for injury to a child ten years of age, who was wrongfully on a street railway car, and jumped from it, while it was moving rapidly, at the direction of the driver, the court placing its decision upon the ground that the child was young and could not be expected to act as an adult would do.

It was held in *Kline v. Central Pacific R. Co.*, 37 Cal. 400, that the company was liable where a boy sixteen years of age leaped from a train upon which he was a trespasser, at a show of force displayed by the conductor, and the principle asserted in *Lovett v. Salem, etc., R. Co.*, *supra*, was accepted as the ruling one.

In *Meeks v. Southern Pacific R. Co.*, 56 Cal. 513; s. c., 38 Am. Rep. 67, an infant of six or seven years of age was sleeping on the track and it was held that as those in charge of the train were bound to keep a vigilant watch, the company was liable for injuring the child that its employees might have seen and rescued from danger.

 Indianapolis, Peru and Chicago Railway Company v. Pitzer.

A very able court, speaking by one of its ablest judges, said of the duty of an engineer: "If however he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time." *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274. Other cases assert similar doctrines, and to them we refer without further comment. *Ballimore, etc., R. Co. v. State*, 33 Md. 542; *Isbel v. New York, etc., R. Co.*, 27 Conn. 392; *Isabel v. Hannibal, etc., R. Co.*, 60 Mo. 475; *East Tennessee, etc., R. Co. v. St. John*, 5 Sneed, 524.

The complaint explicitly avers that there was no negligence on the part of the parents, so that the question turns, so far as the element of contributory negligence is involved, solely upon the conduct of the child.

It is contended that the injury to the child was so remote that it cannot be attributed to the negligent act of the appellant. This question has been recently so fully discussed by us that we do not deem it necessary to again enter upon an extended discussion of the subject. *Louisville, etc., Ry. Co. v. Falvey*, 104 Ind. 409; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346; s. c., 49 Am. Rep. 168; *Dunlap v. Wagner*, 85 Ind. 529; s. c., 44 Am. Rep. 42; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; s. c., 40 Am. Rep. 230; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474; s. c., 48 Am. Rep. 179.

Many of the cases we have here cited assert a doctrine in strict harmony with our own cases, and indeed the doctrine is expressly held in the famous squib case, upon which authors and courts have founded their statements and decisions for many years. In that case no wilful or malicious tort was committed, for the defendant threw the lighted squib in sport, and this being passed from hand to hand, at last struck the plaintiff's ward, and put out his eye. All the judges agreed that the defendant was liable, although they differed as to whether the action should be case or trespass, one of the judges saying that "Wherever a man does an unlawful act he is answerable for all the consequences." *Scott v. Shepherd*, 2 W. Bl. 892.

There is, in truth, no case that has been recognized as sound, that holds that the rule as to the responsibility of the wrong-doer is

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

different in cases of actionable negligence from that which prevails in cases of wilful or malicious torts. There is a difference as to the measure of damages, for where the tort is malicious, exemplary damages may be recovered, but such damages cannot be recovered in cases of negligence. This consideration has however no influence upon the question of a negligent wrong-doer's responsibility for the consequences resulting from his act.

[Minor points omitted.]

Judgment reversed.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J. [Omitting minor points.] We think the case presented by the complaint an unusually strong one, and far within the authorities. If the employees of a railroad company see a child of seven years of age upon the track, far enough off to easily stop the train, but instead of stopping it, negligently run upon it and crush it to death, then, upon the clearest principles of justice and right, the company is liable. In our former opinion we cited many cases sustaining that conclusion. But in this case we have the further element that the conductor put the child off at a station, unattended and uncared for, and without commending him to the care of any person.

We did not depart from our own decisions in affirming, as we did, that more care is required where a child of tender years, or a helpless man, is seen upon the track, than where one who has reached the age of discretion, and appears to be in possession of his faculties, is seen on the track.

In the case of *Pittsburgh, etc., Ry. Co. v. Vining*, 27 Ind. 513, a child of seven years of age was treated as too young to be guilty of negligence, and a complaint not nearly so strong as the present was held good. *Lafayette, etc., R. Co. v. Huffman*, 28 Ind. 287, does not at all conflict with our conclusion. On the contrary, it gives it strong support, for it was there said: "Thus if an engineer of a locomotive discovered a young child on the railroad track, he would be required to use greater effort to stop the train than could have been expected from him if he had discovered a grown person in the same situation. In the latter case, he could reasonably depend more upon the judgment and presence of mind of the person on the track to save himself from danger than in the former case."

Surely the appellant cannot get any support from the doctrine of the case cited. It might doubtless do so, if the complaint did

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

not negative negligence on the part of the child's parents, but this is expressly negated in the complaint before us. In the case of *Hathaway v. Toledo, etc., Ry. Co.*, 46 Ind. 25, a recovery was denied because there was contributory negligence; but in this case that is expressly negated. The complaint in *Jeffersonville, etc., R. Co. v. Bowen*, 40 Ind. 545, was not so strong as the present, and the court said that it could see no objection to it. In *Binford v. Johnston*, 82 Ind. 426; s. c., 43 Am. Rep. 502, this court asserted that the same rules were not applicable to children as to adults, and the assertion was supported by the citation of many authorities. This principle is also recognized in *City of Indianapolis v. Emmelman*, 108 Ind. 530.

Turning now to the cases cited by the appellant from other courts, we find counsel saying: "*Scheffler v. Minneapolis, etc., Ry. Co.*, 32 Minn. 518, a child eighteen months of age was killed. Held, the child was a trespasser, and the company was not required to anticipate that it would be on the track." But a moment's reflection must produce the conviction that this doctrine cannot apply to a case where the child was seen and distinguished. That we are right in our interpretation of that decision is apparent from the language employed by the court in the case referred to, for it was said: "If the engineer had seen him, and then had not exercised proper care to avoid striking him, there would have been a different case. *Locke v. First Division St. Paul, etc., R. Co.*, 15 Minn. 350."

In the case of *St. Louis, etc., Ry. Co. v. Freeman*, 36 Ark. 41, the decision so far as it concerns the question here under discussion is against the appellant, for it was there held that the company was not responsible, "unless the trainmen, after discovering the child, omit the use of reasonable precaution to avoid the injury." Here the company is responsible, because after having seen the child, they used no precaution at all, although the train might have been easily stopped. The decision in *Prendegast v. N. Y., etc., R. Co.*, 58 N. Y. 652, is also against the appellant, for to quote the language of the case, "a child of such tender age was clearly *non sui juris*, and his conduct therefore presented no bar to a recovery. *Ihl v. Forty-second Street R. Co.*, 47 N. Y. 317."

In the case cited by the court in the quotation we have made, the child fell upon the track at a sufficient distance in front of a street car to have enabled a sister, who was with her, to have extricated

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

her, "had the driver," to use the language of the court, "been observant of what was passing and slackened his speed." And it was held that "the conduct of the infant may have an important bearing on the question of the defendant's negligence, but when the latter is clearly negligent, contributory personal negligence on the part of an infant obviously not *sui juris* cannot be alleged, unless negligence on the part of his guardian or custodian has brought about the situation, or in some manner contributed to the injury. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 460."

In the case cited by the court in the extract just given, it was held that there was a difference between children of tender years and adults, and the cases of *Hartfield v. Roper*, 21 Wend. 615; s. c., 34 Am. Dec. 273; *Robinson v. Cone*, 22 Vt. 213, and *Daley v. Norwich, etc., R. Co.*, 26 Conn. 591; s. c., 68 Am. Dec. 413, were cited. It appears therefore that when we get to the foundation of the New York case cited, it is against the appellant instead of in its favor upon the material point here involved, namely, whether the trainmen had the right to expect the same care of a child of tender years as from an adult. In the other New York case cited, a boy, described by the court "as a bright, active boy, about seven years of age, considered competent by his parents to go to school and upon errands alone," attempted to run across the track in front of a train approaching a crossing over which he had often gone, and it was held that there could be no recovery. It is obvious that there is a wide difference between that case and this, where the boy was seen on the track in time to stop the train, and where negligence on his part and on that of his parents is directly negatived. *Cauley v. Pittsburgh, etc., Ry. Co.*, 95 Penn. St. 398; s. c., 40 Am. Rep. 664, was a case in which boys got upon a car, and when ordered off by the conductor while the train was in motion, leaped from it and one was injured. Of this case it is perhaps enough to say that it is not in point, but it may be added that it is in direct conflict with many cases, and certainly with one in the same court. *Baltimore, etc., R. Co. v. Schwindling*, 101 Penn. St. 258, simply decides, what we strongly asserted in our former opinion, that the railroad company is not liable for an injury to a child on its train as an intruder, because of any negligence in the construction of the road or machinery.

In *Marcott v. Marquette, etc., R. Co.*, 49 Mich. 99, the decision was the third one in the case, but it does not touch the point here

Indianapolis, Peru and Chicago Railway Company v. Pitser.

involved, for it was decided upon the ground that the child was not seen, the court saying: "The engineer was watching the track for obstacles and discovered none." When the case was in the court the second time, it was held that "the lookout upon a locomotive must be as efficient as the circumstances require, and especially so when the chances of access to the track are greater than usual. *Marcott v. Marquette, etc., R. Co.*, 47 Mich. 1. This doctrine is clearly hostile to the appellant's views, and is in harmony with the ruling in *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, cited in our former opinion.

The decision in *Chicago, etc., R. Co. v. Stumps*, 69 Ill. 409, does not by any means support the appellant's contention. In that case a boy seven years of age climbed on a train and was injured. It was held that there could be no recovery because there was no negligence on the part of the company, but the court said: "The proof shows appellee was only seven years of age when he sustained the injuries. He was too young to be charged with negligence, and could be held to no care other than such a child of that age could be expected to exercise for its personal safety. The principal question in the case therefore is, whether the employees of the company were guilty of culpable negligence in the management of the train."

In *Bishop v. Union R. Co.*, 14 R. I. 314; s. c., 51 Am. Rep. 386, a boy of six years of age wrongfully jumped on a moving car, and was injured in leaving it. It was held that the company was not liable because the boy was an intruder, and it appeared that, as the court said, "the driver did not see the boy and knew nothing of the accident." It is impossible for us to perceive what application that case has to the present.

In *Morissey v. Eastern R. Co.*, 126 Mass. 377; s. c., 31 Am. Rep. 686, a child not seen by the engineer was run over, and it was held that the company was not liable, the court saying: "The defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him." It is apparent from the cases decided by that court, and cited in our former opinion, that had the child been seen in time to have stopped the train by the exercise of reasonable care, the company would have been held liable.

The decision in *Chicago, etc., Ry. Co. v. Smith*, 46 Mich. 504; s. c., 41 Am. Rep. 177, was placed entirely upon the ground that there was no negligence on the part of the railway company, the

Indianapolis, Peru and Chicago Railway Company v. Pitzer.

court saying: "In other words the injury resulted from an accidental fall of the boy and without any carelessness or negligence of the company's servants." It is evident from the cases cited in our former opinion, that the Supreme Court of Michigan is far from sanctioning the doctrine asserted by the appellant, and it is perhaps unnecessary to refer to other decisions in that court, but if there were doubt on this subject it would be removed by the opinion of the court, written by Judge COOLEY, in *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503. In that case it was held that it was not enough for the conductor of a street railway car to warn a child not to ride on the platform, but that he must employ more efficient means to remove him from danger. The cases of *Hargreaves v. Deacon*, 25 Mich. 1; *City of Chicago v. Starr*, 42 Ill. 174, and *Hughes v. Macfie*, 2 H. & Colt. 744, are not in point, for they belong to an entirely different class of cases from the present.

We have thus patiently and perhaps at unnecessary length reviewed all of the cases cited by appellant, and find that not one among them all supports the proposition, that where a child is seen upon the track in time to easily check the train, he may be run over and killed without any effort to stop the train.

The authorities, as we feel confident in affirming, all agree that there is a difference between children of tender age and persons old enough to possess judgment and discretion. We sought to make this distinction prominent, for we thought and still think that it is of controlling importance. An adult it may be presumed will after warning leave the track when danger approaches, but this is not presumed where very young children are on the track of a railroad. Where a young child is on the track, it cannot be presumed as in the case of an older person that he will leave it in time to avoid an approaching train. Under the authorities it is probable that this complaint would not have been good had Arthur Pitzer been old enough to be presumed to exercise judgment and discretion; but it is good, because he was a child of tender years. It was necessary therefore to emphasize as we did his age, for had he been of mature years, it might perhaps have been presumed by the trainmen that he would have left the track in time to escape the approaching train. But we are not here dealing with the case of a person who had arrived at years of discretion, but with the case of a young child, and we decide nothing that can be considered as applicable to any other case.

We think it very clear upon the whole complaint, that the damages laid are the proximate result of the appellant's tort. We are also of the opinion that there is such a connection between the conductor's tort in putting the child off of the train, and the wrongful acts of the other employees of the appellant, as makes it proper to unite these acts in one complaint. We are clear that upon all the facts pleaded, the complaint makes a case entitling the appellee to compensatory, but not exemplary damages.

Petition overruled at the costs of the appellant.

Petition overruled.

EASTMAN V. STATE.

(100 Ind. 373.)

Constitutional law — regulation of physician.

The legislature may regulate the practice of medicine and surgery, and prescribe the qualifications of applicants for license.

THE opinion states the point.

G. B. Adams, for appellant.

L. T. Michener, attorney-general, and *W. B. Hord*, for State.

ELLIOTT, C. J. The appellant challenges the validity of the act regulating the practice of medicine and surgery, and on this challenge arises the principal question in the case.

The police power of a State is very broad and comprehensive. It has been variously defined by the courts and text-writers. It is, said one of the courts, "that inherent and plenary power in the State, which enables it to prohibit all things hurtful to the comfort, safety and welfare of society." *Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191; s. c. 22 Am. Rep. 71. "All laws," says another court, "for the protection of the lives, limbs, health and quiet of persons, and the security of all property within the State, fall within this general power of the government." *State v. Noyes*, 47 Me. 189.

In *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140, it was held, that under the general police power of the State, "persons and property are subjected to all kinds of restraints and burdens, in order to

secure the general comfort, health and prosperity of the State, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

In speaking of this power, it was said by this court, in *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201, that "It extends to the protection of the lives, limbs, health, comfort and convenience, as well as the property, of all persons within the State. It authorizes the legislature to prescribe the mode and manner in which every one may so use his own as not to injure another, and to do whatever is necessary to promote the public welfare, not inconsistent with its own organic law."

The views expressed in these cases are well supported by authority. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692; *Cooley Const. Lim.* 572; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Live Stock Ass'n v. Crescent City*, 1 Abb. (U. S.) 388; *Slaughter-House* cases, 16 Wall. 36.

The practice of medicine and surgery is a vocation that very nearly concerns the comfort, health and life of every person in the land. Physicians and surgeons have committed to their care the most important interests, and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice medicine and surgery. For centuries the law has required physicians to possess and exercise skill and learning, for it has mulcted in damages those who pretend to be physicians and surgeons, but have neither learning nor skill. It is therefore no new principle of law that is asserted by our statute; but if it were, it would not condemn the statute, for the statute is an exercise of the police power inherent in the State. It is, no one can doubt, of high importance to the community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled, and learned men, although it is not within the power of the legislature to discriminate in favor of any particular school of medicine. When intelligent and educated men differ in their theories, the legislature has no power to condemn the one or approve the other, but it may require learning and skill in the school of medicine which the physician professes to practice. *White v. Carroll*, 42 N. Y. 161; s. c., 1 Am. Rep. 503.

The rule requiring physicians to possess learning and skill is a very ancient one. *Bonham's case*, 8 Co. 227; *College of Physicians v. Levett*, 1 Ld. Raym. 472. This rule of the common law has been incorporated in many of the State statutes, and these statutes have always been upheld.

The statute of Minnesota is very similar to ours, and it was held to be valid in *State v. State Med. Ex. Board*, 32 Minn. 324; s. c., 50 Am. Rep. 575, the court saying: "In the profession of medicine, as in that of the law, so great is the necessity for special qualification in the practitioner, and so injurious the consequences likely to result from the want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties, cannot be doubted."

Speaking of a statute like ours, another court said: "We are of opinion that all of the provisions of the act under consideration, as above set out, and independent of any constitutional warrant for its enactment, would be maintainable under the police power of the State; that, under this general power, the legislature is the proper judge as to what regulations are demanded in dealing with the property and restraining the actions of individuals. *Logan v. State*, 5 Tex. App. 306.

The subject was examined in all its important phases in *Ex parte Spinney*, 10 Nev. 323, and the statute declared valid. A like result was reached by the court in *Hewitt v. Charier*, 16 Pick. 353. A full discussion of the question will be found in *Fox v. Washington Territory*, 5 W. C. Rep. 339, where a similar result was reached. Judge Cooley strongly and unequivocally affirms the validity of statutes like ours. Cooley Torts, 289, 290. The question received a very careful consideration in *State v. Dent*, 25 W. Va. 1, and it was held that the statute was valid in every part.

For more than eighty years a similar statute has been in force in New York, and the courts of that State have uniformly regarded it as valid. *Sheldon v. Clark*, 1 Johns. 513; *Allcott v. Barber*, 1 Wend. 526; *Timmerman v. Morrison*, 14 Johns. 369; *Thompson v. Staats*, 15 Wend. 395; *Bailey v. Mogg*, 4 Den. 60; *Finch v. Gridley*, 25 Wend. 469. In very many other cases such statutes have been enforced. *Antley v. State*, 6 Tex. App. 202; *Musser v. Chase*, 29 Ohio St. 577; *Wert v. Clutter*, 37 Ohio St. 347; *Bibber*

Eastman v. State.

v. Simpson, 59 Me. 181; *Thompson v. Hazen*, 25 Me. 104; *State v. Gregory*, 83 Mo. 123; s. c., 53 Am. Rep. 565.

The appellant is right in asserting that the departments of the government are separate and distinct, and that a clerk of a county cannot exercise judicial powers. *Smith v. Myers*, 109 Ind. 1, and cases cited. But he is wrong in affirming that the act under examination confers upon the clerk judicial powers.

The power to accept or reject an application for license, under the statute, is not a judicial one, although it may involve some exercise of discretion. *Elmore v. Overton*, 104 Ind. 548; s. c., 54 Am. Rep. 343; *Cooley Torts*, 411.

If an exercise of discretion constituted a clerk a judicial officer, then he would be such in every case in which he issues a writ, files a paper or approves a bond, for all these acts involve some exercise of discretionary power. The statute does not require the clerk to sit in judgment upon the sufficiency of the application for a license, for the affidavits prescribed and the diploma required constitute the evidence upon which the clerk must act. The diploma and affidavits compel him to grant the license, and it is therefore not possible to regard his duty as a judicial one. *Flournoy v. City of Jeffersonville*, 17 Ind. 169; *Betts v. Dimon*, 3 Conn. 107; *State, ex rel., v. Doyle*, 40 Wis. 175.

Whether the statute is a wise one or not is a purely legislative question, and so is the question whether it is reasonable or unreasonable. This doctrine was thus expressed in *Hedderich v. State*, 101 Ind. 564; s. c., 51 Am. Rep. 768. "Whether a statute is or is not a reasonable one is a legislative and not a judicial question. Whether a statute does or does not unjustly deprive the citizen of natural rights is a question for the legislature, and not for the courts. There is no certain standard for determining what are or are not the natural rights of the citizen. The legislature is just as capable of determining the question as the courts. Men's opinions as to what constitute natural rights greatly differ, and if courts should assume the function of revising the acts of the legislature on the ground that they invaded natural rights, a conflict would arise which could never end, for there is no standard by which the question could be finally determined."

Judge Cooley says: "Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social,

or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution." Cooley Const. Lim. (5th ed.) 197. At another place this author says: "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power." Cooley Const. Lim. (5th ed.) 201.

The offense is charged in the language of the statute, and this is sufficient. *State v. Miller*, 98 Ind. 70, and cases cited; *Graeter v. State*, 105 Ind. 271; *Antle v. State*, 6 Tex. App. 202.

In discussing the evidence, counsel assert that as the terms of the statute are broad and sweeping, courts must create exceptions in order to give it a just and reasonable effect. There are perhaps extreme cases where exceptions may be created by the courts, but these cases are very rare, and the authority to create exceptions is one to be exercised with great delicacy. It can never be exercised where the words of the statute are free from ambiguity and its purpose plain. It is only where the necessity is imperious, and where absurd or manifestly unjust consequences would otherwise certainly result, that the courts can create exceptions. This is not such a case. It is the purpose of the statute to prevent persons who do not possess the necessary qualifications to practice medicine or surgery from inflicting injury upon the citizens by undertaking to treat diseases, wounds and injuries. It is the plain intention of the statute to keep out of the professions of medicine and surgery all who do not possess learning and skill sufficient to enable them to properly discharge the duties incumbent upon members of those honorable professions, and courts have no right to create an exception which will defeat that intention.

It is immaterial whether the person who undertakes to treat diseases or wounds does it for hire or not, for unless he is qualified as the statute requires, he must not undertake the treatment of diseases or wounds at all. The courts cannot divide professional persons into classes, and assert that one class is within the law and the other not, for the law applies to all who assume the responsible duty of treating the sick, wounded or injured citizens, as well those who expect compensation for their services, as those who do not. The great object of the law is to allow none but skilled and learned persons to attempt to exercise functions and duties which require knowledge and skill, and it is not material whether reward

Hull v. Louth.

is paid or promised, or the services are rendered without compensation or the promise of it.

The State has an interest in the life and health of all its citizens, and the law under examination was framed, not to bestow favors upon a particular profession, but to discharge one of the highest duties of a State, that of protecting its citizens from injury and harm.

It has been for ages a ruling principle of jurisprudence, "that regard for the public welfare is the highest law," and that principle is here of controlling force, for few things, if indeed any, are more important than that the health, limbs and lives of the citizens should not be intrusted to the care of persons who lack the knowledge and skill requisite to enable them to render proper medical and surgical treatment to the citizens afflicted by disease, wounds or injuries.

Judgment affirmed.

HULL V. LOUTH.

(109 Ind. 315.)

Deed — insanity of grantor — disaffirmance.

E., a person of unsound mind and unable to comprehend the transaction, without any consideration conveyed her real estate to T. by deed, which was duly recorded. To secure a loan of money with which to pay off delinquent taxes and other liens against the land, T. executed a mortgage thereon to H., who had no knowledge of E's unsoundness of mind, but advanced the money and accepted the security in good faith, relying on the public records. E. received no benefit from the money, either in person or estate. *Held*, that H. could not maintain an action to foreclose the mortgage as against E.

ACTION of foreclosure. The head-note states the point. The defendant had judgment below.

D. Turpie, G. O. Behm, A. O. Behm, H. W. Chase, F. S. Chase and F. W. Chase, for appellant.

B. W. Langdon and T. F. Gaylord, for appellees.

ZOLLARS, J. [Omitting detailed statement of pleadings, and minor points.] The important question presented by the pleadings is, whether the defense of insanity may be made against appellant,

who, acting upon the faith of the public records of deeds and mortgages, without knowledge of the fact that Emma J. was a person of unsound mind at the time she executed the deed to Henry C., in good faith furnished money to Henry C., and accepted from him the mortgage in suit.

Appellant's pleadings seem to have been drawn largely upon the theory that he could be protected by showing that the conveyance from Emma J. to Henry C. was such that neither she nor her guardian could avoid it in this action, because it had not been disaffirmed, and because the parties had not been placed in *statu quo*.

Appellant cannot successfully insist that there must have been a disaffirmance of the deed from Emma J. to Henry C. As already stated, she could not disaffirm, because of her insanity. Her guardian could not have disaffirmed prior to the bringing of the suit, because he had not been appointed at that time. Appellant brought Emma J. into court to answer his bill, and the filing of the answer and cross complaint was a sufficient disaffirmance, both as to him and Henry C., if in any event, under the facts of the case as shown by the pleadings, a disaffirmance could have been necessary.

Neither can appellant successfully insist that his mortgage shall be protected and enforced, simply because neither Emma J. nor her guardian have refunded, or offered to refund, to him the money he advanced to Henry C. upon the faith of the mortgage. As already stated, it is admitted that there was no consideration for the deed from Emma J. to Henry C., and it is not shown that she received any of the money advanced by appellant, nor that any of it was, in any way, applied for her use and benefit.

Nor can appellant's mortgage be upheld upon the ground that Henry C. was an innocent purchaser from Emma J. In the first place, as we have seen, there was no consideration for the deed; and in the second place, it is not shown that Henry C. did not know that Emma J. was a person of unsound mind at the time the deed was executed. If he had paid a consideration, and the transaction were one that might in any event be upheld, it would still be necessary that Henry C. should have paid the consideration, and accepted the deed in ignorance of the fact that Emma J. was a person of unsound mind.

When it is established by averment or by evidence that the grantor was a person of unsound mind at the time the conveyance

Hull v. Louth.

was made, the burden is upon the other party to the transaction to show amongst other things that he accepted the conveyance in ignorance of such mental unsoundness. *Riggs v. American Tract Society*, 84 N. Y. 330; *Fulwider v. Ingels*, 87 Ind. 414.

Appellant's case upon the pleadings is simply this: "Emma J., an insane person, conveyed her land to Henry C. without any consideration, who for aught that appears accepted the deed with knowledge of her insanity. As against him she had the right through her guardian to have the deed set aside, and the title to the land quieted in her. Appellant relying upon the public records of deeds and mortgages, advanced money to Henry C. and accepted the mortgage from him, without knowledge that Emma J. was insane at the time she executed the deed. There is nothing to show that any of the money so advanced was received by Emma J., nor that any portion of it was used or applied for her benefit. Appellant does not allege in any of his pleadings, that he was ignorant of the fact that there was no consideration for the deed from Emma J. In short it is not shown that there are any equities as between her and appellant. If his mortgage may be upheld and enforced against the land, it must be upon the ground that the deed from Emma J. to Henry C. was recorded; that relying upon the public records of deeds and mortgages, and being ignorant that Emma J. was a person of unsound mind, he advanced money to Henry C. and accepted the mortgage from him.

His counsel argue that deeds from persons of unsound mind before an inquest of lunacy are not void, but voidable only; that the ground upon which such deeds are set aside is fraud, and that fraud which overthrows such deeds as between immediate parties will not affect the title of innocent purchasers from the rational party. The position of counsel is too narrow. If it were admitted to be correct as a rule of law, it would follow that in no case can the property of a person of unsound mind be reclaimed unless actual fraud has been practiced, or the conveyance has been accepted with knowledge of such unsoundness of mind, which knowledge of itself might amount to fraud. But such is not the law as we understand it. The courts scrutinize with jealous care all contracts made with persons of unsound mind, and will set them aside if fraud has been practiced.

And so in all cases fraud vitiates contracts. But in the case of contracts with persons of unsound mind, the courts do not stop

with the inquiry as to whether or not actual fraud may have intervened. Such persons are regarded as within the watchful and protecting care of the courts, and when it is discovered that they have entered into contracts, except in some cases which need not here be enumerated, such contracts will be set aside because of their mental infirmity, whether there has been actual fraud or not. But if it should be conceded that fraud alone is the ground upon which such contracts are set aside, it would not follow necessarily that third parties should be protected as in cases of fraud, where the contracting parties are mentally sound, and capable of managing their property and understanding the force and effect of contracts. In such a case, two rational minds meet, agree upon, and presumably comprehend the contract. One of the parties, by shrewdness, or by deceit and false representations, may overreach the other, yet that other is rational, and capable of yielding assent to the contract as made. For this reason, he will not be heard to urge the fraud to the detriment of innocent third parties. In some cases, too, one of the parties may have been able to avoid the fraud of the other by the exercise of reasonable care. With persons, such as it is alleged Emma J. Taylor was, and is, the case is radically different. They are wanting in that which is essential in all contracts, the mental ability to comprehend and yield assent to the contract. They cannot therefore, in any case, be chargeable with want of care in being overreached by the other contracting party.

As it is alleged here, that Emma J. Taylor, at the time she executed the deed to Henry C., had the appearance of a sane and rational person, and it does not affirmatively appear that Henry C. had knowledge of the fact that she was a person of unsound mind; we assume for the purpose of this decision, and without stating the reasons or going into an examination of the authorities, that the contract or deed was not void, but voidable only. It was not voidable on the ground of fraud, because no actual fraud is alleged, but voidable because Emma J. was a person of unsound mind; And being voidable on this ground, it is voidable as against appellant. This conclusion, we think, is supported by reason and authority.

In the case of *Somers v. Pumphrey*, 24 Ind. 231 (238), in speaking of an instruction refused below, this court said: "We have already shown that if the defendants, Isaac and Jonathan Somers, were innocent purchasers, in good faith, for a valuable considera-

Hull v. Louth.

tion, their title would not be affected by the fraud of Golvin Somers, or Steinman, in procuring Elizabeth to execute the deed to the latter. But this instruction goes further, and assumes that the same rule would apply if Elizabeth was of unsound mind at the time she executed the deed. * * * The contract of a *non compos mentis* differs materially from one procured by fraud from a person of sound mind. In the latter case, the contract is made by one of sufficient capacity, and competent to make it, and his mind has consented to it, but that consent has been induced by the fraud of the other contracting party; but if the person is *non compos mentis* there is a want of capacity to contract; he does not, in a legal sense, consent, because there is a want of that mental capacity essential to a legal consent. In this respect, the case seems to be analogous to the contract of an infant, in whom there is also a want of capacity to contract, and it has been held that a deed made by an infant might be avoided by his heirs, though the estate had passed into the hands of a *bona fide* purchaser, for a valuable consideration. *Doe, ex dem. Moore, v. Abernathy*, 7 Blackf. 442. We think the instruction was correctly refused."

In the case of *Nichol v. Thomas*, 53 Ind. 42 (53) it was said: "The conveyance of an insane person, but who is apparently sane, stands, in all substantial respects, as the conveyance of an infant."

The case of *McClain v. Davis*, 77 Ind. 419, involved commercial paper in the hands of innocent holders. It was said: "There was nothing received in consideration of the contract under consideration, of which it can be said that restitution should be made before a disaffirmance should be permitted; and it is no objection that the note had passed, before maturity, into the hands of an indorsee. Commercial paper is not an exception to the rule which permits a disaffirmance by any one who was of unsound mind at the time of becoming a party thereto. The purchaser of such paper takes with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind."

The cases above cited were approved in the case of *Northwestern Mutual Fire Ins. Co. v. Blankenship*, 94 Ind. 535. The case of *Somers v. Pumphrey*, was also approved in the case of *Musselman v. Cravens*, 47 Ind. 1 (9). An act of 1852, and still in force, provides that "persons of unsound mind and infants may not alien lands nor any interest therein." 1 Rev. Stat. 1876; p. 361; Rev. Stat. 1881, § 2917.

In the case of *Freed v. Brown*, 55 Ind. 310 (317), in speaking of that act, it was said: "It will be seen from this provision, that persons of unsound mind and infants, so far as the mere right or power to convey lands is concerned, are classed together and clothed with the same disability. It has always been held however that the deed of an infant is not void, but merely voidable. * * * We know of no sound reason, either in principle or policy, why the same doctrine should not ordinarily apply to the deeds of persons of unsound mind, nor why such persons, upon the removal of their disability, should not have the same right or power, as infants have, to ratify or to disaffirm their deeds, made while under disability."

In speaking of conveyances by persons of unsound mind, and the rights of innocent purchasers, the Supreme Court of Michigan, in the case of *Rogers v. Blackwell*, 49 Mich. 192, said: "It is further claimed that the defendant mortgagees stand in the relation of *bona fide* purchasers and should therefore be protected. But to protect them would be to give force and effect, to that extent, to the deed of conveyance; to treat it as a valid subsisting instrument; to not consider it as voidable but as valid. If the acts of an insane person can thus be made valid and binding, an easy method is thereby found for disposing of his property. We are of opinion that the complainant is entitled to the relief prayed for."

In the case of *Hovey v. Hobson*, 53 Me. 451, after holding that a deed of a person of unsound mind, not under guardianship, obtained without fraud, and for an adequate consideration, and that has not been ratified, is not void, but voidable, it was said, in speaking of the rights of a third person as an innocent purchaser: "It is apparent that the protection of the insane and the idiotic will be materially diminished, if the heirs cannot follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person. The acts of lunatics and infants are treated as analogous, and subject to the same rules. *Key v. Davis*, 1 Md. 32; *Hume v. Barton*, 1 Ridg. Pl. 77. 'The grants of infants and persons *non compos* are parallel both in law and reason.' *Thompson v. Leach*, 3 Mod. 310. The law is well settled that a minor when of age may avoid his deed given when an infant. He may do this not merely against his grantee, but he may follow the title wherever it may be found and recover his land."

After a further discussion of the right of an infant to thus reclaim his land and the reasons upon which that right rests, it was further

said: "In this view of the subject, no purchaser under an infant's deed is innocent in the eye of the law, until the title has been confirmed by the matured consent of the grantor." And still further: "When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title — and he does convey such title to all *bona fide* purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee, whose title is thus derived, must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee."

Other holdings in that case may not be reconcilable with rulings by this court, and hence we here approve so much of the case only as is to the effect that persons of unsound mind are not estopped to reclaim their land, simply because it may have passed into the hands of third persons as innocent purchasers.

We here repeat, what has before been stated, that in the case before us, as made by the pleadings, there is no question of restitution, because Emma J. received nothing directly or indirectly for her land.

In the case of *Wireback v. First Nat'l Bank*, 97 Penn. St. 543; s. c., 39 Am. Rep. 821, it was held that an accommodation indorser of a promissory note, who receives no benefit therefrom either to himself or his estate, may defend against a *bona fide* holder on the ground that he was *non compos mentis* at the time of the indorsement; and this though the holder had at the time of the transfer to him no knowledge of the indorser's lunacy. In that case the court quoted with approval from the case of *Moore v. Hershey*, 90 Penn. St. 196, the following: "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against

the maker." It was further said: "If the holder could recover against one who was insane when he indorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or indorses a note may, by his representative, plead his infancy as a complete defense. In like manner a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder who may have given value to his indorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration; then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. * * * The holder of a madman's note stands in no better position than the payee."

Mr. Bishop, in his work on Contracts, at section 297, in speaking of fraud, infancy and insanity, and the rights of third persons as innocent purchasers, says: "If we look for the true reason why, when a man has but a voidable title, he can make, what he has not, a complete one in his grantee, we shall probably find it in the equitable view that he who suffered his own weakness to be imposed upon, and was therefore in a measure to blame, should bear loss rather than the meritorious third person who was clear of every fault. In a case of insanity the considerations are reversed. To the insane person not even carelessness can be attributed. And the third person was in a degree careless; because, insanity being usually a permanent condition, he could ascertain its existence by inquiry, as a third person could not a fraud. Therefore, the rule ought to be, that if real estate, for example, has by the deed of an insane man passed to a grantee who has conveyed it to a third person, though for its full value, and without notice, this third person should have a mere defeasible seisin, like his grantor's."

The above authorities, from which we have made the copious quotations, make strong our conclusions, that appellant may not enforce his mortgage against the land, simply because, in good faith, without knowledge of the mental imbecility of Emma J., and in reliance upon the public records, he advanced money to Henry C., and accepted from him the mortgage. They accord to Emma J. the same right to reclaim her land that is accorded to infants under like circumstances, that is, the right to reclaim the land from an innocent third person, who may have purchased it from her grantee.

Hull v. Louth.

That an infant has such a right, is settled in this State by the adjudications of this court. *Miles v. Lingerman*, 24 Ind. 385; *Richardson v. Pate*, 93 Ind. 423; s. c., 47 Am. Rep. 374; *Wiley v. Wilson*, 77 Ind. 596; *Law v. Long*, 41 Ind. 586.

Indeed it would seem that if there should be any difference between the case of infants and that of a person so imbecile in mind as Emma J. is shown by the pleadings to have been, and to still be, that difference ought to be in favor of the latter.

A person under the age of majority, with a normal mind, may have discretion to understand the force and effect of a contract entered into, and so the force and effect of a deed for his lands. A person, such as Emma J. is shown to have been, could have no just conception of what she was doing in executing the deed. See *Burke v. Allen*, 9 Fost. 106 (117).

However that may be, we are clear that under the averments in the pleadings, Emma J., by her guardian, is not estopped to reclaim the land, and have her title quieted as against any claim of appellant under his mortgage.

The general rule is, that no one can convey a better title than he holds. Under that general rule Henry C. could convey no better title than he had under his deed from Emma J. On account of her mental imbecility that title was not indefeasible. The most that can be said for it is that it may not have been void, but voidable.

The protection extended to innocent purchasers of real estate rests upon the doctrine of estoppel. The theory is that the grantor has done something, or omitted to do something, which has induced a third person to act upon the appearance of things, and to invest his money in the land. In other words, some act must be done, or there must be some omission which would render the avoidance of the conveyance a fraud upon the person who invested his money, relying upon the act done, or the appearance of things caused by such omission. It is impossible to conceive how Emma J., in the mental condition she is shown to have been, could have done any thing, or been guilty of omission, which could work an estoppel against her. She had no communication or dealings with appellant. She did not cause her deed to Henry C. to be recorded, and if she had, that act ought not to estop her, because she had no more mental ability to comprehend its meaning than she had to comprehend what she was doing in executing the deed. She could

Sherwood v. City of Lafayette.

not be guilty of wrong in a business transaction, because she lacked the ability to bind herself by such transaction. And for want of such ability, she could not be guilty of an omission that would estop her. But in fact the only thing she did was to execute the deed to Henry C. She thus put it in his power to cause a record of it to be made that might mislead others. But for that act she is not responsible, for the same reason that she was not mentally competent to execute the deed.

What we have said, is limited to the case before us, as made by the pleadings. If it were shown that a consideration had passed from Henry C. to Emma J. for the deed, or if it were shown that the money advanced by appellant, and received by Henry C., has been used and applied for the use and benefit of Emma J., possibly the case might be different. What the rule in that case might be, we do not decide, because the pleadings do not make such a case.

Here there are no equities as between Emma J. and Henry C., because there was no consideration for the deed, either by or of any thing advantageous to her, or detrimental to him. Neither are there equities as between her and appellant, because she had no dealings with him, and no part of the money advanced by him to Henry C. was used or applied for her benefit. It results from what we have said, that the court below did not err in sustaining the demurrers to appellant's pleadings.

Judgment affirmed.

SHERWOOD V. CITY OF LAFAYETTE.

(109 Ind. 411.)

Eminent domain — taking mortgaged property — mortgages entitled to damages.

The mortgages of land taken by a city for a public street may recover from the city the damages awarded, notwithstanding the amount has already been paid to the mortgagor.

ACTION to recover damages for land condemned. The opinion states the case. The defendant had judgment below.

J. B. Sherwood and S. P. Baird, for appellant.

W. C. L. Taylor, for appellees.

Sherwood v. City of Lafayette.

ELLIOTT, C. J. The appellant's complaint alleges that Anna M. Artz was, on the 12th day of December, 1870, the owner of land in the city of Lafayette; that she and her husband executed a mortgage on the land to Solomon Roring, now deceased, and that the mortgage was recorded on the day of its execution; that on the 20th day of August, 1879, the executor of the deceased mortgagee commenced suit to foreclose the mortgage, and obtained a decree of foreclosure; that on the 30th day of December, 1872, the city of Lafayette commenced proceedings to condemn part of the mortgaged land for a street, and damages were awarded to Anna M. Artz; that the damages awarded have never been paid, although possession of the land has been taken by the city, and that the mortgagors are insolvent.

The complaint states a cause of action. The seizure of the mortgaged premises did not destroy the validity of the mortgage or impair the rights of the mortgagee. He had a right to treat the lieu of his mortgage as having been transferred to the fund created by the award. Mr. Jones correctly states the rule thus: "When the mortgaged property has been turned into money, or a claim for money in any way, as for instance, by the taking of the property for public uses, or for the use of a corporation under authority of law, the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim. Thus if a street be laid out through land subject to a mortgage, although the damages be assessed to the mortgagor, the mortgagee is entitled to them, as an equivalent for the land taken for the street." 1 Jones Mortg., § 708.

In the case of *Bank of Auburn v. Roberts*, 44 N. Y. 192, the court said: "The sum awarded arises from or grows out of the land, by reason of the injury which has diminished its value. In equity it is the land itself." Substantially the same doctrine is *Ball v. Green*, 90 Ind. 75, see p. 76.

We agree with appellees' counsel, that a complaint must be framed on a definite theory, and be sufficient on that theory. *Judy v. Gilbert*, 77 Ind. 96; s. c. 40 Am. Rep. 289. We think the complaint before us conforms to these requirements. The theory of the complaint is, that the city of Lafayette has funds in its hands which, in equity, should be paid to the plaintiff, and it is good on the theory on which it proceeds. Anna M. Artz is made a party to assert her interest in the damages awarded, so that the whole

controversy may be adjudicated, and it was not necessary to state what specific interest she claimed in the fund.

The third paragraph of the answer avers that proceedings were duly prosecuted for the condemnation of the land; that an award of damages was made to Anna M. Arzt, and that the award was fully paid to her before any demand was made by the appellant.

The answer is bad. The authorities, without material conflict, hold that a mortgagee cannot be deprived of his lien by a condemnation of the land embraced in his mortgage. It is true as contended by appellees' counsel, that a mortgage does not convey title to the mortgagee. *Fletcher v. Holmes*, 32 Ind. 497; *Favorile v. Deardorff*, 84 Ind. 555. But while the mortgage does not convey title to the land, it nevertheless does convey to the mortgagee an interest in the land itself of which he cannot be divested. *Lease v. Owen Lodge, etc.*, 83 Ind. 498; *Helphensteine v. Meredith*, 84 Ind. 1.

There is a clearly defined distinction between a mortgage and a judgment lien; the one is a specific lien created by contract and protected as a contractual obligation, while the other is a statutory lien, general in its character, and subject to legislative control. *Gimbel v. Stolte*, 59 Ind. 446; *Houston v. Houston*, 67 Ind. 276; *Evansville Gas-light Co. v. State*, 73 Ind. 219; s. c. 38 Am. Rep. 129; *Duke v. Beeson*, 79 Ind. 24, p. 31; *Duncan v. City of Terre Haute*, 85 Ind. 104; *Blair v. Hanna*, 87 Ind. 298, see p. 301.

A mortgage does create an interest in the land, and the authorities declare that proceedings under the right of eminent domain cannot destroy the interest it creates.

In *Severin v. Cole*, 38 Iowa, 463, the question was examined with care, and it was said that: "The mortgagor, it is true, holds the legal title; but the mortgagee has an equitable interest in, or right to, the mortgaged property, and under the above statute is an 'owner of the real property.'"

It was said by the court in *Parks v. City of Boston*, 15 Pick. 198, 203; s. c., 19 Am. Dec. 322: "It has heretofore been decided by this court, and apparently upon much consideration, in the case of *Ellis v. Welch*, 6 Mass. 246, and that the term 'owner' in this statute, includes every person having an interest in real estate capable of being damaged by the laying out of a street."

In *Gimbel v. Stolte*, *supra*, the doctrine of these cases was approved by this court, for it was there said: "So, where mortgaged

Preston v. Witherspoon.

property has been condemned for street purposes by a city, the mortgagee is entitled to be paid out of the money allowed the mortgagor as damages." The authorities give full and strong support to the doctrine. *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76; *Tide Water Canal Co. v. Archer*, 9 Gill & John. 479; *White v. Rittenmyer*, 30 Iowa, 268; *Choteau v. Thompson*, 2 Ohio St. 144; *Kennedy v. Milwaukee, etc., Ry. Co.*, 22 Wis. 581; *Philadelphia, etc., R. Co. v. Williams*, 54 Penn. St. 103; *Astor v. Hoyt*, 5 Wend. 603; *In the matter of John and Cherry Streets*, 19 Wend. 659.

As said in *Severin v. Cole, supra*: "This rule too is equitable and just. The mortgage being of record, it was entirely practicable for the defendant, in obtaining its right of way, to give notice to the mortgagee of record, and thereby protect its own interests and those of such mortgagee or his assigns."

It is only by adopting the view of these authorities, and treating the mortgagee as an owner within the meaning of the statute that the statute itself can be upheld, for it is very clear upon principle and authority, that the mortgagee does own some interest in the land which cannot be divested except by due proceedings under "the law of the land." *Soulard v. United States*, 4 Pet. 511; *Lease v. Owen Lodge, etc., supra*; *Helphenstine v. Meredith, supra*. Nor is any violence done to the language of the statute in treating a mortgagee as an owner, for in a limited sense, he is an owner, as he has a proprietary interest in the land itself.

Judgment reversed.

PRESTON V. WITHERSPOON.

(100 Ind. 457.)

Warehouseman — sale — commingling of grain — estoppel.

One who deposits wheat for storage, knowing that it is to be commingled with wheat owned by the warehouseman, and that the latter is selling and publicly shipping from the common mass, is estopped to assert title as against an innocent purchaser in the usual course of business.

ACTION for value of wheat. The opinion states the case. The defendant had judgment below.

VOL. LVIII — 53

M. W. Fields and L. C. Embree, for appellants.

J. E. McCullough, J. H. Miller and J. W. Ewing, for appellants.

ZOLLARS, J. The nature of the case sufficiently appears from the special finding of facts made by the court below at the request of appellants.

As the brief of counsel for appellees contains a fuller statement of the facts found than does the brief of counsel for appellants, we take therefrom the following summary, making a few additions thereto:

The defendants Runcie & Wallace under the firm name of "The Fort Branch Elevator Company," were engaged at Fort Branch in buying, selling and shipping wheat, and for hire receiving wheat from farmers for storage, and on demand of the depositors were to return to them wheat of a like kind, quality and amount as that deposited, but not the identical wheat.

The company occupied an elevator and warehouse, situated fifty or sixty feet apart. The elevator contained fourteen bins, each holding when filled 3,000 bushels of wheat, and the warehouse three bins holding 6,000 bushels.

The plaintiffs severally during the months of June, July and August, 1883, deposited wheat in amounts set out in the finding. The wheat deposited by the plaintiffs was all delivered at and taken in at the elevator, except 200 bushels of the plaintiff Preston's wheat, which was taken in and stored at the warehouse.

The company from July 10, 1883, to March 1, 1884, received for storage from the plaintiffs and other depositors 40,000 bushels of wheat, and during the same time bought, sold and shipped on their own account 55,000 bushels.

The wheat bought and the wheat deposited was nearly all taken in at the elevator, being hauled there in wagons by the farmers, and unloaded into a common receptacle, and from there elevated to the bins in the elevator, and in this way all the wheat purchased and taken in at the elevator, and all the wheat deposited and stored in the elevator was mixed and mingled together.

It was the custom of the company to sell wheat from the elevator, and to ship from the elevator in car lots of from one to five cars at a time, the shipments being publicly made from the elevator from day to day and from week to week. The plaintiffs knew that

Preston v. Witherspoon.

the company was selling wheat, and knew at the time they deposited their wheat that the custom of the company was to mix wheat purchased and stored and sell from the common bin.

About the 1st of March, 1884, the company sold and shipped from the warehouse four cars of wheat (two cars of Mediterranean and two of Fall) to the defendants Witherspoon, Barr & Emison, who were engaged in the milling business at Princeton, Ind., under the firm name of Witherspoon, Barr & Co.

The Mediterranean wheat was purchased by Runcie & Wallace and stored by them in the warehouse, separate and apart from any wheat of their customers, and also separate and apart from other wheat bought and sold by the elevator company.

The firm of Witherspoon, Barr & Co. purchased and paid the Fort Branch Elevator Company the contract price and market value of said wheat, in the due course of business, and without having any knowledge or information that plaintiffs, or any one else, had or claimed to have any interest in or title to the same.

"The Fort Branch Elevator Company," on their own account, from July 10, 1883, to March 7, 1884, sold and shipped the 55,000 bushels of wheat bought, and also the 40,000 bushels deposited by the plaintiffs and others, except the four cars sold to Witherspoon, Barr & Co., and the 2,377 bushels left in the elevator after the company ceased to do business, which was March 7, 1884. The wheat thus left in the elevator was taken by the depositors and divided *pro rata* among themselves.

A short time before the sale to Witherspoon, Barr & Co., Preston, being in the warehouse with Wallace, said to him: "Where is my wheat?" and Wallace said: "There is all of your wheat," pointing to a pile of wheat in the warehouse, containing three or four thousand bushels. And a few days afterward the plaintiff Preston and Wallace, went together to Vincennes to sell the wheat, and being unable to realize a satisfactory price, they started back to Fort Branch; and on their way back it was understood that Wallace should stop off at Princeton, and see what was the best offer he could get for the wheat. Wallace stopped off, went to Witherspoon, Barr & Co., and sold the wheat shipped to them a few days afterward.

After it was all paid for and all unloaded except one-third of one car, the plaintiffs made a demand on Witherspoon, Barr & Co. for the wheat, who refused to give it up.

The court found, as a conclusion of law, that the defendants, Witherspoon, Barr & Emison, were not liable to the plaintiffs, or either of them, in any sum whatever, because :

1. The Mediterranean wheat, bought by said Runcie & Wallace, is not of the kind or quality of that deposited by the plaintiffs or either of them.

2. The facts do not show that the Fultz wheat, so bought by Witherspoon, Barr & Emison, was the wheat of the plaintiffs or either of them.

3. Because (in any view of the facts) Runcie & Wallace were, by the voluntary acts of the plaintiffs, clothed with the apparent title and right to sell, and the said Witherspoon, Barr & Emison were *bona fide* purchasers for value.

The only error assigned by the appellants is, that upon the facts specially found, the trial court erred in its conclusions of law.

Upon the facts found by the trial court, are Witherspoon, Barr & Co. liable to the plaintiffs who deposited wheat with the Fort Branch Elevator Company? That is the question, and the only question for decision here.

In the case of *Rice v. Nixon*, 97 Ind. 97 ; s. c. 49 Am. Rep. 430, cited by counsel for appellants, the question was, whether, as between the depositories and the warehouseman, the latter should be held as a bailee or as a purchaser of the wheat deposited for storage, which, without his fault and before a demand therefor by the depositories, had been destroyed by fire. The depositories sought to hold him liable as a purchaser, because he had mixed their wheat in a bin with wheat deposited by others, and with wheat purchased by him, and had sold from the common mass. That he had done in keeping with a custom of his. But of that custom the depositories prosecuting the action had no knowledge. There was always in the bin wheat enough to supply all depositories, and at any time before the fire they could have received from the bin all the wheat they had deposited. Upon the facts thus before the court, it was held that the warehouseman was a bailee, and not a purchaser, of the wheat so deposited.

It will be observed, that in that case the wheat deposited had all been deposited in, and the sales made from a common bin, and that it does not appear whether or not any of the wheat deposited by the plaintiffs in the action remained in the bin at the time of the fire. See, also. *Bottenberg v. Nixon*, 97 Ind. 106.

Preston v. Witherspoon.

The case of *Schindler v Westover*, 99 Ind. 395, also cited by appellants' counsel, involved a question of title to wheat, as between the depositors and a mortgagee of the warehouseman. The wheat (five hundred bushels) had been stored to be kept until the first of the following July. The depositors requested that their wheat should be kept in a separate bin. That the warehouseman declined, but agreed that the wheat should not be taken from the mill, and that he would return a like amount and a like quality whenever called for by the depositors. The wheat was stored in a bin with the wheat of other depositors, and with wheat bought by the warehouseman, and from the common mass, wheat was taken in the manufacture of flour. Before the third day of the following March, all of the wheat so received from the depositors, together with that with which it had been so commingled, had been ground into flour and disposed of by the warehouseman. On that day there were 1,900 bushels of wheat in the mill, and the warehouseman executed a chattel mortgage thereon. The mortgagees, under and by virtue of that mortgage, took possession of and sold the wheat. Before it was removed from the mill the depositors demanded of the warehouseman and the mortgagees, the amount of wheat by them deposited. It was held that the depositors and depositary were tenants in common of the 1,900 bushels of wheat then in the mill; that the title of the depositors to 500 bushels of wheat in the mill was superior to any claim of the depositary, although the identical wheat stored by them had been previously manufactured into flour; that the mortgagees could not, and did not, by virtue of the chattel mortgage, acquire a better title to the wheat mortgaged than the mortgagor had; that upon demand by the depositors for a return of the 500 bushels (so much being then in store), their title thereto was absolute and perfect as against the depositary, or those claiming under him, and that if such demand were refused, they could maintain replevin for the possession of the wheat, or if, after demand for the return of the wheat, the parties in possession should convert the same to their own use, the depositors could maintain an action for the recovery of damages for such wrongful conversion of the wheat.

It will be observed, that in that case the wheat mortgaged was in the mill at the time the mortgage was executed, and at the time the demand was made by the depositors, and that in quantity it was more than equal to the amount stored by the plaintiffs in the action.

In the case before us, the wheat sold by the elevator company to Witherspoon, Barr & Co., was not kept in the same bin, nor in the same building where appellants' wheat was kept, while it was kept by the elevator company. In this regard, the facts in the case differ from the cases above cited. The warehouse however seems to have been used by the elevator company in the transaction of its general business, and was situated but fifty or sixty feet from the elevator.

Whether this difference in the facts of the cases requires a different ruling as to the rights of the depositors and the depository, as between themselves, is a question we need not here decide. For the purposes of this decision, we may assume that the elevator company held appellants' wheat as bailee.

The agreement was that the elevator company should return to the depositors, not the identical wheat deposited, but wheat of a like kind and quality. Two car loads of the wheat sold to Witherspoon, Barr & Co. was Mediterranean wheat, purchased by the elevator company, and stored in the warehouse, whence it was shipped to the purchasers.

As we understand counsel for appellants, they do not claim that there can be a recovery for that wheat, as it was not of the kind and quality of the wheat stored by appellants. The other two car loads, so sold to Witherspoon, Barr & Co., were Fultz wheat, the same as that stored by appellants.

The case before us differs in other important regards from the cases above cited. There, the wheat in question was in the bins where it had been placed upon being stored; in one case, at the time when the fire occurred, and in the other, at the time the mortgage was executed and the demand therefor was made. Here, the wheat in question was not in the possession of the depository, nor was it in the building where it had been stored at the time the demand therefor was made upon Witherspoon, Barr & Co. On the contrary, Witherspoon, Barr & Co. had purchased it in the usual course of business, and had paid for it, without any knowledge of any claim by appellants; it had been shipped to them, and was in their possession as such innocent purchasers. When appellants stored their wheat, they knew that the custom of the elevator company was to mix all the wheat stored and that purchased by the company in a common bin or bins, and to sell and ship from the common mass. They knew also after their wheat had been

Preston v. Witherspoon.

stored that the elevator company was selling and shipping wheat from the common mass. It was the custom of the company, as found by the court, to ship from the elevator from one to five cars at a time, the shipments being publicly made from day to day, and from week to week.

We think, as concluded by the court below, that by the voluntary acts of appellants, Runcie & Wallace, the persons composing the elevator company, were clothed with the apparent title and right to sell, and that as Witherspoon, Barr & Co. were innocent purchasers in the usual course of business, they should be protected.

As a general proposition, it is well settled both in law and reason, that no one can convey a better title to property than he has. In other words, no one without title to property can convey title thereto, and thus defeat the claims of the rightful owner. But there are many cases where the owner of property will be estopped to assert his title thereto as against an innocent purchaser for value. We think this is such a case. As we have seen, appellants knew that their wheat was to be, and was commingled with wheat purchased by the elevator company, and that that company was selling and publicly shipping from the common mass. They therefore knew that others were purchasing the wheat from the elevator company, in the usual course of business, and paying their money therefor. By thus putting their wheat into the possession of the elevator company, and allowing it to sell and ship from the common mass, they clothed that company with an apparent ownership of and authority to sell the wheat, which estops them to assert their title thereto, as against Witherspoon, Barr & Co., who invested their money in good faith, believing that to be a fact which appellants by their conduct permitted to appear to be a fact. *Quick v. Miligan*, 108 Ind. 419, and cases there cited.

As between appellants and the elevator company, the question is, what authority did the elevator company in fact have to sell and dispose of their wheat? As between appellants and Witherspoon, Barr & Co., the question is, with what apparent authority did appellants clothe the elevator company to sell and dispose of their wheat?

In the case of *Cowdrey v. Vandenburg*, 101 U. S. 572, it was said: "The principle is well settled that when the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with

him, they shall be protected. * * * The rights of innocent third parties * * * 'do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance.'"

Either appellants or Witherspoon, Barr & Co. must suffer by the alleged wrong of the elevator company. As between them, the loss ought to fall upon appellants.

Not asking that their identical wheat should be kept for them, they trusted to the honesty of the elevator company, that in quantity and quality the amount stored should be restored to them. As between them and the elevator company they are innocent of wrong or laches. As between them and Witherspoon, Barr & Co., the rule should be applied, that where one of two innocent persons must suffer by the wrong of a third person, he must be the sufferer who put it in the power of the wrong-doer to cause the loss.

In the case of *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30 (69), we find this statement: "It goes back to the celebrated aphorism of Lord HOLT, in *Hern v. Nichols*, 1 Salk. 289, 'For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger,' or as more tersely expressed by ASHHURST, J., in *Lickbarrow v. Mason*, 2 T. R. 70, 'Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.'" See also *Quick v. Mulligan*, *supra*; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Young v. Bradley*, 68 Ill. 553.

[Minor points omitted.]

Judgment affirmed, with costs.

Petition for a rehearing overruled.

Allen v. Craft.

ALLEN V. CRAFT.

(100 Ind. 478.)

Will—rule in Shelley's case—fee.

A testator devised lands in trust for Matilda, the wife of his son Mark, "and her heirs forever;" directing that she should have the sole use, control, benefit and profits thereof, independent of her husband, and that at her death "the heirs of her body" should control and enjoy the same; provided that if on Mark's death Matilda should survive, the heirs of her body, then living, should receive two-thirds of the profits, and if Matilda should marry again, the heirs of her body then living should manage and control the lands, giving to Matilda one-third of the profits for her life; and that Matilda's issue by any other husband should not take, and that Matilda should not alienate the lands after Mark's death. *Held*, that Matilda took a fee.

THE opinion states the case.

W. B. Biddle and C. H. Truesdell, for appellants.

M. H. Weir, E. E. Weir, J. Bradley, J. H. Bradley, D. J. Wile and F. E. Osborn, for appellees.

ELLIOTT, C. J. The second item of the will of Catharine Allen reads thus:

"*Secondly.* I devise and bequeath unto John Allen, of Xenia, in Greene county, in the State of Ohio, in trust for Mrs. Matilda Allen, the present wife of my son, Mark Allen, and her heirs forever, the following real estate, to-wit: The south half of section 28, in township 36 north, of range 3 west, situate and lying and being in the county of Laporte, aforesaid. And I hereby direct that the said Matilda shall have the sole use, control, benefit and profits thereof, free and clear of and from her said husband, my son, Mark Allen, and free and clear of all interference on his part in the management thereof, the receipt of profits arising therefrom, and in all matters whatsoever during her natural life, and at and after her death, then the heirs of her body shall in all things control and manage the same and receive the rents and profits arising therefrom. Provided nevertheless that upon the death of my son Mark, if my said daughter, Matilda, should survive him, the heirs of her body then living and in being shall thenceforward be entitled to receive two-

thirds of the profits thereof to be equally divided between them, and should the said Matilda marry again, then the heirs of her body then in being shall thenceforward manage and control the said land, still giving to my said daughter one-third of the profits during her natural life, but in no case shall the issue of my daughter Matilda, by any marriage other than with my son Mark, be entitled to inherit any thing under or by virtue of this will, but I expressly prohibit them therefrom, and in case that my daughter Matilda shall survive her present husband, she shall not after his death alienate the said estate."

The designation of John Allen as trustee is ineffective, inasmuch as no power of control or disposition is vested in him. The estate, whatever its character, devised to Matilda Allen vests directly in her. This is the effect of the statute as the trust is a mere naked one. R. S. 1343, p. 447, § 181; R. S. 1881, § 2981.

The controlling question in the case is as to the nature of the estate devised to Matilda Allen. If the estate devised is a fee, then the judgment below was right; if not, the judgment is wrong and must be reversed.

The contention of appellee's counsel, that if the estate devised would have been an estate tail at common law, it is an estate in fee-simple under our statute, must prevail. R. S. 1843, p. 424, § 56; R. S. 1881, § 2958; *Tipton v. La Rose*, 27 Ind. 484.

There were at common law two kinds of estates tail, general and special. Blackstone thus describes the latter: "Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general." Bl. Com. 113.

In this instance, if the estate devised is an estate tail, it is a special one, for the words of the will restrain the persons who shall take to those begotten by the son of the testatrix and the husband of the donee. The inquiry as to whether the estate tail, conceding that this is the estate created by the devise, is a special or a general one, is important only for the purpose of showing that a limitation to a designated class of heirs does not cut down the estate of the first taker to less than a fee, for the estate is a fee although the limitation may be to a designated class of heirs to the exclusion of all others. It results from this rule of law, that the limitation to the heirs of the body of Matilda Allen, begotten by Mark Allen, does not, in itself, further affect the devise than to make it what at common law would be an estate tail special, but if it be such an

Allen v. Craft.

estate at common law, then by force of our statute, it is an absolute estate in fee, since all estates tail are transformed into fees absolute.

What we have said disposes of the clause limiting the inheritance to the heirs begotten by Mark Allen, considered in itself and apart from the other provisions of the will, and we proceed to analyze and discuss the other provisions of the instrument.

It is firmly established by our decisions, that the rule in *Shelley's* case is the law of this State. In one case the court declared and enforced this rule, but expressed the hope that it might be changed by legislation, avowing that it was not within the power of the court to change it, much as the court doubted its wisdom and justice. *Siceloff v. Redman*, 26 Ind. 251, see p. 259. But the rule has been so repeatedly and emphatically declared to be a rule of property, that it is no longer a question as to its binding force upon the courts of the State. *Hochstedler v. Hochstedler*, 108 Ind. 506; *Fountain County, etc., Co. v. Beckleheimer*, 102 Ind. 76; s. c., 52 Am. Rep. 645, and auth. cited, p. 77; *Shimer v. Mann*, 99 Ind. 190; s. c., 50 Am. Rep. 82; *Ridgeway v. Lanphear*, 99 Ind. 251; *Biggs v. McCarty*, 86 Ind. 352; s. c., 44 Am. Rep. 320; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 283.

The clause in the will containing the words "unto Matilda Allen and her heirs forever," if it stood alone, would unquestionably carry the case far within the rule in *Shelley's* case. *Shimer v. Mann*, *supra* and cases cited; *Hochstedler v. Hochstedler*, *supra*. The clause cannot however be severed from those with which it is associated, but must be considered in conjunction with them.

We have no doubt that a clause creating an estate in fee may be so modified by other clauses as to cut down the estate to one for life, but to have this effect the modifying clauses must be as clear and decisive as that which creates the estate. *Hochstedler v. Hochstedler*, *supra*; *Bailey v. Sanger*, 108 Ind. 264; *Thornhill v. Hall*, 2 Cl. & F. 22; *Collins v. Collins*, 40 Ohio St. 353; *Lambe v. Eames*, L. R., 10 Eq. Cas. 267; *Clarke v. Leupp*, 88 N. Y. 228; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63.

If the other words of the will are as strong and clear as those of the clause "unto Matilda Allen and her heirs forever," then it may well be held that the estate is less than a fee. The word "heirs" is, as Mr. Preston says, the "most powerful" that can be employed, and this our cases recognize. *Shimer v. Mann*, *supra*, and cases cited. *Hochstedler v. Hochstedler*, *supra*.

Strong as is the words "heirs," it may be read to mean children, if the context decisively shows that it was employed in that sense by the testator. *Ridgeway v. Lanphear*, *supra*; *Shimer v. Mann*, *supra*; *Hadlock v. Gray*, 104 Ind. 596. But there must be no doubt as to the intention of the testator to affix to the word "heirs" a meaning different from that assigned it by law. *Shimer v. Mann*, *supra*; *Jessen v. Wright*, 2 Bligh (H. L. Cas.), 1, 56; *Doe v. Gallini*, 5 B. & Ad. 621; *Lees v. Mosly*, 1 Y. & Coll. Exch. Cases, 589; *Powell v. Board, etc.*, 49 Penn. St. 46, 53; *Den v. Emans*, Penn. (N. J.) 967; *Robins v. Quintiven*, 79 Penn. St. 333.

It appears from these principles, that the words employed in the clause, "unto Matilda Allen and her heirs," must prevail to carry a fee, unless we find equally clear and decisive terms cutting down the estate, and this is not possible unless, as said in one of the cases cited, the intent to employ the "heirs" in a different meaning from that assigned it by law is so plain that nobody can misunderstand it. Our search then must be made with these rules as our guide.

The clause which gives to Matilda Allen the sole control of the estate during life, and after her death "then to the heirs of her body," is but a reiteration of the meaning conveyed by the clause we have already discussed, for in themselves they carry a fee, as the powerful term "heirs" is still employed. Proceeding with our analysis, we come to the clause, "Provided nevertheless that upon the death of my son Mark, if my daughter should survive him, the heirs of her body then living shall thenceforth be entitled to receive two-thirds of the profits thereof, to be equally divided among them, but should the said Matilda marry again then the heirs of her body then in being shall thenceforward manage and control the land, still giving to my daughter one-third of the profits thereof during her natural life, but in no case shall the issue of my daughter by any marriage other than with my son Mark inherit any thing under or by virtue of this will, but I expressly prohibit them therefrom, and in case my daughter Matilda should survive her present husband, she shall not after his death alienate the said estate."

The introductory clause in which the word "heirs" occurs undoubtedly shows, if taken by itself, that the word was not used as signifying "heirs" in the legal sense of the word, but we cannot separate this clause from the other members of the sentence, and considered, as undeniably it must be, in connection with them it must yield. This we say because in the clause blended with it is the

word "issue," and this is ordinarily a word of limitation of the same force as the word "heirs."

In *Quackenbos v. Kingsland*, 102 N. Y. 128; s. c., 55 Am. Rep. 771, the words of the will were: "I give, devise and bequeath unto my son Daniel Kingsland, and to his heirs; but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children," and it was held that Daniel took an estate in fee. The definition of the word "issue" was tersely stated by Lord ELDON in *Sibley v. Perry*, 7 Vesey, 522, for he said: "Upon all the cases this word *prima facie* will take in descendants beyond immediate issue."

In *Powell v. Board, etc.*, 49 Penn. St. 46, it was said: "Undoubtedly in a will the word 'issue' is regarded as primarily a word of limitation, and as synonymous with the technical words 'heirs of the body.' Hence it is presumed that when a testator devises an estate for life, with a remainder to the issue of the devisee of that estate, he intends the remaindermen to take as heirs of the body by descent from their ancestor rather than as purchasers, themselves the root of a new succession."

To a like effect is the statement in *Den v. Emuns*, Penn. (N. J.) 967, 971, that "the word 'issue' in a devise, as a word of limitation, is synonymous to 'heir;' it is *nomen collectivum*, and takes in the whole generation."

In *Robins v. Quinliven*, 79 Penn. St. 333, these words were used: "The word 'issue' in a will *prima facie* means 'heirs of the body,' and in the absence of explanatory words showing that it was used in a restricted sense, is to be construed as a word of limitation."

In *Carroll v. Burns*, 15 Weekly Notes of Cas. 553; s. c., 55 Am. Rep. 778, n., it is said: "The rule is unquestioned that *prima facie* in a will the word 'issue' means 'heirs of the body,' and will be construed as a word of limitation, unless there be explanatory words showing it was used in a restricted sense."

These decisions, to which many more might be added, do no more than give expression to a long-existing and well-known principle, and the rule affixing to the term "issue" the meaning expressed in these cases, requires that the term, as used in the will before us, should be deemed to mean "heirs," in the sense in which that term is employed in the clause of the will which reads "unto Matilda Allen and her heirs forever." Hawkins Wills, 189.

It is contended however that the restriction upon the power of alienation evinces an intention to devise only a life-estate to Matilda Allen. But it is to be noted that the language in which the restriction is expressed is ambiguous, if indeed the only just meaning that can be put upon it is not adverse to the appellant's contention. The restriction is not that Matilda shall in no event alienate the land, but that she shall not do so in one event; that is in the event that she survives her husband. The clear implication is that during her husband's life she was empowered to alienate the land, so that so far as the question of alienation is concerned, the words of this part of the will are not inconsistent with those which so clearly and decisively create an estate in fee. If only a life-estate was intended to be vested in the first taker, then there was no reason for imposing a restraint upon the power of alienation. But under the rule of which we have spoken, we cannot enter into conjectures as to the effect of the clause respecting the power of alienation, for unless it can be affirmed that the clause is as clear and decisive as that which creates the estate, the estate cannot be cut down. It would have been impossible to have found in all the domain of legal terminology stronger words than those employed, "to Matilda Allen and her heirs forever," and they must control the feeble influence of the clause which attempts to limit the right of Mrs. Allen to alienate the land devised to her.

There is another principle in the law of real property, which exerts a controlling influence here, and that is this: Where an estate in fee is created in clear and decisive terms, a restriction upon the right of alienation is of no effect. There may be a partial restriction but there cannot be a general one. This must be so, or else reason and logic must be disregarded, for a fee simple necessarily implies absolute dominion over the land, and this cannot exist if the power of disposition is hampered by a restriction destroying the absolute dominion inherent in the owner of the fee. *McWilliams v. Nisly*, 2 S. & R. 507; s. c., 7 Am. Dec. 654; *Moore v. Shultz*, 13 Penn. St. 98; s. c., 53 Am. Dec. 446; *De Peyster v. Michael*, 6 N. Y. 467; s. c., 57 Am. Dec. 470; *Mandlebaum v. McDonell*, 29 Mich. 78; 4 Kent. Com. 5.

Undoubtedly the cardinal rule in the construction of wills is that the intention of the testator shall prevail; but where words are used which have a settled legal meaning, full effect must be given to them.

The cases go very far upon this question. Thus, in *Doe v. Jackman*, 5 Ind. 283, it was said: "But the term 'heirs,' is one of limitation. It has a fixed and legal meaning, and a mere presumed intention will not control its signification. It cannot be held a word of purchase, unless the testator's intent so to use it appears manifest."

In *McGray v. Lipp*, *supra*, the court said: "Under the rule in *Shelley's case*, the fee passes in opposition to the apparent intention of the testator."

This court, in *Siceloff v. Redman*, *supra*, said: "Although from this language it is apparent that the testator intended that Virginia should take a life estate only, and that her heirs should take after her death, and as the estate so intended to be granted to Virginia would terminate at her death, and could not therefore descend to her heirs, it would seem apparent that the testator intended that the heirs should take directly from him, as purchasers, and not by descent from the ancestor; yet by the technical meaning applied to the word 'heirs,' under the rule in *Shelley's case*, this apparent intention is denominated a presumed intent, and is not allowed to control the technical meaning of the word 'heirs,' or in other words, despite the apparant intent of the testator, the rule gives the fee to the ancestor."

Again, in the case of *Gonzales v. Barton*, 45 Ind. 295, the court said: "If the question could be regarded as one of intention, there would be no difficulty in coming to the conclusion that in this case it was intended that Morey should take a life-estate only. But such is not the rule, as may be seen by reference to the cases cited as having been decided in this court."

Mr. Fearne states the rule very strongly, perhaps too strongly, for he says that the most positive direction will not defeat the operation of the rule in *Shelley's case*. 2 Fearne Remainders, § 453.

Judge SHARSWOOD, in delivering the opinion of the Supreme Court in *Ingersoll's Appeal*, 86 Penn. St. 240, 245, said: "Nothing certainly is better settled than that the intention of a testator, if not contrary to law, shall be carried out in the disposition he may make of his property after death. There are many things which he cannot do, however clearly he may intend it. He cannot create a fee and clog the power of alienation or relieve it from liability for debts. He cannot create a perpetuity by an executory devise

after an indefinite failure of issue or at any other future period, which may not be until after a life or lives in being and twenty-one years." The same learned judge in *Doebler's Appeal*, 64 Penn. St. 9, at page 15, said: "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him instead of construing that which he has made."

In *Bender v. Fleurie*, 2 Grant, 345, the testator gave to his daughter certain land in these words: "She shall have it as her own during her life, and then it is to come to the heirs of her body for their own use." This was held to be clearly an estate tail within the rule, and it was said by the court: "But it is said the testator did not mean to give her an estate tail. Perhaps he did not. But he has used words which in law mean nothing else. If he intended to give but a life-estate *voluit [sed] non dixit*, we must take what he said, not what he meant. * * * But no court in this State or in England, has ever treated the phrase 'heirs of her body,' as words of purchase, when they are used with reference to the issue of a devisee, to whom a life-estate is given. They are words of limitation, and as such they create an estate tail in the first taker, which cannot be cut down even by the clearest expressions of a desire, that it shall be a life-estate only."

Preston says: "In wills, the rule applies generally, and without exception, to the several limitations, as often as the gift to the heirs is without any expression of qualification," and in illustration of his meaning, he further says: "Neither the express declaration, *First*. That the ancestor shall have an estate for his life and no longer; nor, *secondly*. That he shall have only an estate for life in the premises, and that after his decease, it shall go to his heirs of his body, and in default of such heirs, vest in the person next in remainder; and that the ancestor shall have no power to defeat the intention of the testator; nor, *thirdly*. That the ancestor shall be tenant for his life and no longer, and that it shall not be in his

power to sell, dispose, or make away with any part of the premises;
 * * * will change the word 'heirs' into words of purchase."
 Preston Estates, 365.

In a work declared by the Supreme Court of Pennsylvania, in *Hileman v. Bouslaugh*, 13 Penn. St. 314, to be a "masterly disquisition," it is written: "The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not, whether the author of the limitations intended it to be applied or not. We might as well ask whether a testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exceptions." Hays Principles for Expounding Dispositions of Real Estate, 96 (7 Law Library, 52).

The question here under discussion was examined by us in *Shimer v. Mann*, *supra*, and many authorities considered. As a result of that investigation it was declared that "Superadded words, which merely describe or specify the incidents of the estate created by such a word of limitations as 'heirs,' do not cut down the interest of the devisee."

Stronger still is the expression of the rule in *Walker v. Vincent*, 19 Penn. St. 369, for it was there said: "The law does not pretend to carry out the intention of the testator in all cases; for many testators show a very clear intention to shackle the estates granted by them to a degree that is totally incompatible with any real enjoyment of them, and which the law does not allow. * * * The great merit of the rule in *Shelley's* case is, that it frustrates and is intended to frustrate unreasonable restrictions upon titles; for when an estate is declared to be a fee-simple or fee-tail, it is at once made subject to a limitation in its proper form, no matter how clear may be the testator's intention to the contrary."

The words of limitation when used in a will always control. It is as certain as any proposition in jurisprudence that the words of limitation will bear down all others. There is therefore no escape from the force of the rule in *Shelley's* case, when the word "heirs" is used in its strict legal sense as a word of limitation. But the word "heirs" is not in every case a word of limitation, for it may be employed in a different sense. It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern and the rule in *Shelley's* case; but the ap-

Allen v. Craft.

pearance of conflict fades away when it is brought clearly to mind that when the word "heirs" is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the rule in *Shelley's case*; so that the inquiry is, was the word used as one of limitation? The only method in which an instrument employing the word "heirs" can be shown not to be within the rule, is by showing that the word was not employed in its strict legal sense. As said in *Hileman v. Bouslaugh, supra*, "The question on a will is not whether the testator intended that the rule should not operate, for that is not subject to his power, but whether he used the words 'heirs of the body' as synonymous with the word 'children,' or its proper equivalent." This is essentially the doctrine of our own case of *Shimer v. Mann, supra*. It is because the word "heirs" is not used in its legal sense, that the courts do not apply the rule in *Shelley's case*, for where it is so used, the rule must be applied. It was because the word "heirs" was used as meaning "children," that it was held in *Ridgeway v. Lanphear, supra*, and in *Millett v. Ford*, 109 Ind. 159, that the rule did not operate. Here however we must hold that it does operate, because the explanatory or superadded words do not show with that certainty which the law requires, that the word was not used as a word of limitation. *Shimer v. Mann, supra*, and cases cited.

Judgment affirmed.

Howk, J., does not concur.

Petition for a rehearing overruled.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

WILLINGHAM v. HOOVER.

(74 Ga. 288.)

Damages—remots.

In an action by the purchaser of a saw-mill and outfit to recover damages against the vendor because the property was inferior to that contracted for, losses sustained by the purchaser from abandoning planting operations, improvements made in order to carry on such business, losses of profits by reason of having received an inferior outfit, additional purchases of timber, stock, vehicles, etc., to run a mill of the capacity of that bargained for, and personal services of himself and assistant while he was running the mill, or until its capacity had been fully tested, do not form proper elements of damage.

TROVER. The opinion states the case.

D. H. Pope, for plaintiff in error.

G. J. Wright, C. B. Wooten, L. Arnheim, for defendant.

HALL, J. [Omitting statement of pleadings and minor points.] The only remaining question is one of more difficulty than the others. The complainant claimed damages for alleged losses sustained by abandoning his planting operations and going into the

SMITH V. BONDURANT.

(74 Ga. 418.)

Office and officer — notary — attestation after term.

The attestation of an affidavit by a notary after the expiration of the term of his office, both parties acting in good faith, is valid. (*See note, p. 440.*)

C. H. & R. B. Barnes, for plaintiffs in error.

Hoke Smith, B. F. Abbott, for defendant.

JACKSON, C. J. The legal question which this record makes is, whether a deed of assignment was void because the affidavit thereto was made before a commercial notary public a few days after the expiration of his term of office, and before the renewal of his appointment; and that question turns on this, was he then a *de facto* officer, and if not, then under our statute, is he *de jure* an officer? And that turns upon this, is the commercial notary a public officer?

1. Public officers hold over until successors are appointed. Code, § 132. Notaries public for commercial purposes are public officers. They are appointed by the judges of Superior Court. Code, § 1497. They take an oath before the clerk of the court. Code, § 1498. They hold their office for four years. Code, § 1499. They are sworn like all public officers, that they are not holders of public money belonging to the State. Code, § 1498; also § 129, sub-section 2. Removal from the county vacates the office. Code, § 1501. "They may administer oaths in all matters incident to them as commercial officers, and all other oaths which are not by law required to be administered by a particular officer." Code, § 1502, sub-section 4. Each notary must have "a seal of office, which shall have for its impression his name, officially, and the name of the State and county for which he was appointed," and "he must keep a fair register of all his notarial acts, signed by him, together with the date of the transaction."

So that it seems clear that they are public officers, whose duties are regulated by law, whose oaths are prescribed and recorded on the minutes of the court, and who are authorized to administer any oath not confined by law to a particular officer, and therefore this oath to an assignment. It follows that until a successor was ap-

pointed or he was removed (Code, § 1499), his office continued, and he remained *de jure* the notary for the bank where he acted, and filled that public office for the public as a commercial notary, and empowered to administer this oath to this assignor.

2. But suppose he was not *de jure* a public officer, was he not *de facto* such, and his acts good, when done in good faith by him for any of the public also acting in good faith? We think so most clearly. These *de facto* officers, their official acts, *colore officii*, must be recognized for public safety. The security of property, the vital interests of society, demand the recognition of their acts. It has been our law, or rather, that of our ancestors, ever since the war of the Roses in England, when the king, the fountain of office there, was changed by the winds of revolution, and with him, his appointees were swept from rightful or *de jure* offices, but all their acts while in office were held binding and valid — made so by statute and observed by both sides — all being recognized as *de facto* officers.

It is said that because the number of these commercial notaries is not fixed by law, therefore they are *de facto* officers when holding over, because they have no successors.

It strikes us that the argument is nothing else than a *non sequitur*. Whether one or a hundred fill the office, it is still an office. If at the option of the appointing power, one may be enough or one hundred may be necessary in county or city, the office is still public, and successors are appointed for those who go out. But in the case before us, this notary public was appointed and acted for and at a bank, a necessary officer there, and when it was ascertained that his term of four years had expired, he was reappointed. Suppose another had been appointed and he had been rejected by the judge, would not that other have been his successor? Most assuredly. So that this office at this bank is a public office, administered by a man appointed to it, not by the bank but by the State; not for the bank alone but for the whole public, the bank and all dealing with it or not dealing with it at all, but desiring an official act to be done by this appointee of the State, about any business intrusted to him by the State; and even if out *du jure* because his term of four years was gone, the act was that of a *de facto* officer who had not been removed and to whose office no successor had been appointed.

The principle on which the whole doctrine of the recognition of *de facto* officers and their acts rests, is not how they happen to act *de facto* — whether the cause be an illegal appointment or election,

or an illegal holding over, but it is the convenience of the public — the necessity of the thing, the impossibility of one always knowing when an officer to whom he goes on business of a ministerial character is legally in office, was properly elected or has held too long; it is that where the public servant is acting in the place apparently all right, and the applicant to him in good faith has a deed witnessed or an oath administered, that it is better for society that the act *de facto* stand than that the business of society, the title to property be all wrecked, because parties did not know that the term of office of the public official had expired the day before.

See 53 Mo. 334; 37 Me. 427; 9 Am. Rep. 431; Cro. Eliz. 699, 533; 1 Moore, 109; 1 Ld. Raym. 658; 12 Modern, 467, cited by defendant in error. See also 19 Am. Dec. 63, n; 4 Ired. 368; 9 Am. Rep. 434, n; 74 Ala. 411; 9 Ga. 314, particularly p. 316, opinion of court; 5 Ga. 343 (4); 11 Ga. 426 (2); 14 Ga. 192 (2); 20 Ga. 748, 749 (3, 4); 44 Ga. 454; 52 Ga. 239 (6); 63 Ga. 527, where the doctrine is applied even to the intendant and commissioners of a town in levying taxes. The case of *Cary v. The State*, determined by the Supreme Court of Alabama at its December term, 1884, in a very able and exhaustive opinion by SOMERVILLE, justice, was cited by counsel for plaintiff in error, who was misled by a newspaper syllabus of it; but it is fully on the line of this opinion and the authorities cited above, and we are indebted to Mr. Barnes, since the citation of the syllabus on the hearing of this cause, for the full text of the opinion. Misled himself by the syllabus, he acted as upright counsel always should when he furnished us with the opinion in full.

Judgment affirmed.

HALL, J., concurred; BLANDFORD, J., dissented.

NOTE BY THE REPORTER.— In *Cary v. State*, 76 Ala. 78, cited in the principal case, the court said: "There are two classes of notaries public in this State, each of which is appointed by the governor. The duties of the first class include the administration of oaths, taking acknowledgments of certain instruments of writing, the protesting of bills of exchange, and other like powers, such as are expressly prescribed by statute, or authorized by general commercial usage. Code, §§ 1825, 1829-1831. These are notaries public in the common acceptation. The second class, in addition to these powers, possess also the jurisdiction of justices of the peace, civil and criminal, and are therefore judicial officers. The governor is authorized by the Constitution to appoint one notary of this class for each election precinct in the several counties of the State, and one for each ward in cities of over five thousand in-

Smith v. Bondurant.

habitants, who are *ex officio* justices of the peace within their respective wards or precincts. While the statute expressly declares that the first class shall 'hold office for three years from the date of their commissions, and until their successors are qualified,' it is equally clear in the declaration that the second class shall hold their office three years from the date of their commissions, thus by obvious implication excluding a construction which would permit them to hold for a single day after the expiration of their commissions. Code, § 1825; Const. 1875, Art. IV, § 26.

"Courts are authorized and required to take judicial notice of the various commissioned officers of the State, and to know the extent of their authority, their official signatures, and their respective terms of office—when such terms commence, and when they expire. *Graves v. Anderson*, at present term; *Coleman v. State*, 68 Ala. 98; 1 Greenl. Ev. (14th ed.), § 6. 'This cognizance,' as observed in *Gordon v. Tweedy*, 74 Ala. 237-8, 'may often extend far beyond the actual knowledge, or even the memory of judges, who may therefore resort to such documents of reference, or other authoritative sources of information as may be at hand, and may be deemed worthy of confidence.' The dates of these commissions are matters of public record in the executive department of the State government, being accessible to inquiry by all who may be concerned, and the law fixes the duration of each official term.

"Under these principles of law, the Circuit Court was required to take judicial cognizance of the fact that French Nabors, who issued the warrant sought to be excluded from evidence, was commissioned by the governor of Alabama as a notary public and *ex officio* justice of the peace, on the fifth day of May, 1879, and that his term of office expired on the fifth day of May, 1882, three years from the date of his commission, and several months before the issue of the warrant, which is shown to have been issued the twenty-ninth day of July, 1882. Nabors was not therefore an officer *de jure* when he assumed to do this official act; and unless he was an officer *de facto*, the paper must be held to have no legal validity as a warrant, and consequently to confer no authority upon Reynolds to make an arrest under it. *Niles v. State*, 24 Ala. 672. In this aspect of the case, excluding from consideration all inquiry as to its *de facto* character, a point which we propose next to consider, the paper should have been excluded from evidence as a legal and valid warrant, although admissible as a part of the *res gesta*, if shown to have been exhibited and read to the defendant, at or about the time of the difficulty between the parties, which resulted in the alleged shooting of Reynolds.

"Was Nabors however a *de facto* officer at the time he issued the paper in question?—an act which was done within something less than three months after the expiration of his official term. The general statement is made, that he was an acting notary public at this time; but there is no proof of any other official act being performed by him within this period of time. It may be proper to consider the rules of law governing this feature of the case, in view of the fact that the cause must necessarily be remanded for a new trial, and additional evidence may be offered on this point.

"The rule is well settled, that the official acts of an officer *de facto* are just as valid, for all purposes, as those of an officer *de jure*, so far as the public and

Smith v. Bondurant.

third persons are concerned. *Joseph v. Cawthorn*, 74 Ala. 411, and cases cited. As observed by SUTHERLAND, J., in *Wilcox v. Smith*, 5 Wend. 231, 'the affairs of society could not be carried on upon any other principle.'

"It is sometimes very difficult to determine whether one claiming to exercise the duties of an office is an officer *de facto*, or a mere usurper. The distinction is sometimes said to be, that the former claims to hold under color of election or appointment, while the latter claims no authority or color of authority for his intrusion into possession of the office whose functions he undertakes to usurp. *People v. Staton*, 73 N. C. 546; s. c., 21 Am. Rep. 479. The better and more modern view however is, that no color of election or appointment is needed to constitute one an officer *de facto*. While it is sufficient for such purpose, it is not a necessary pre-requisite. The true principle is, that there must be either some color of election or appointment, or else 'an exercise of the office, and an acquiescence on the part of the public, for a length of time which would afford a strong presumption of at least a colorable election or appointment.' *Wilcox v. Smith*, 5 Wend. 231; s. c., 21 Am. Dec. 213; *State v. Carroll*, 38 Conn. 449; s. c., 9 Am. Rep. 409, 425. Or as we find the rule stated elsewhere, 'the mere exercise of the functions of an office will not be sufficient to make a person a *de facto* officer, where there is no claim to the office under color of an election or appointment, unless the exercise thereof has been open, notorious, and continued for such a length of time, without the public having interfered, as to justify the presumption that the party was duly appointed.' *Hildreth v. McIntire*, 19 Am. Dec. 61, and note on p. 68. In *Rex v. Bedford Level*, 6 East, 356, Lord ELLENBOROUGH defined an officer *de facto* as 'one who has the reputation of being an officer he assumes to be, and yet is not a good officer in point of law,' thus adopting the definition of Lord HOLT in *Parker v. Kett*, 12 Mod. 467, which was decided as far back as the year 1693. The definition is one now fully recognized in England, and has been generally adopted by the American courts in its broadest and most liberal sense. *Wilcox v. Smith*, 21 Am. Dec. 213; *Hildreth v. McIntire*, 19 Am. Dec. 63, note; *State v. Carroll*, 38 Conn. 449; s. c., 9 Am. Rep. 409.

"To constitute Nabors a *de facto* notary, within the above principles, he must either have acted under color of appointment and claim of official right, or he must have continued to exercise the duties of his office, by public acquiescence, for such length of time and by such frequency of repetition as to afford reasonable presumption of his holding over under a re-appointment. The first commission having expired, without any right in law to hold over, it could not, in our judgment, lend color for any length of time beyond its expiration.

"As observed by BUTLER, C. J., in *State v. Carroll*, 38 Conn. 449; s. c., 9 Am. Rep. 426, *supra*, it seems 'absurd to say that color from election or appointment can extend beyond the distinct and independent term for which the officer was elected or appointed, beyond the term when the election or appointment could be made operative, if legal.' Yet although an expired commission is not color of title to office, still if an elected or appointed public officer continues, without break, and without question by the public, to exer-

Braddy v. City of Milledgeville.

cise the functions of the office after the expiration of his commission, this is a continued exercise of the duties of the office by acquiescence, and under the modern rule, constitutes the person thus acting an officer *de facto*. In *Brown v. Lunt*, 37 Me. 423, a justice of the peace, who held over without legal right or re-appointment, continued to act and took an acknowledgment of a deed about two years after the expiration of his term of office. In *Gilliam v. Red dick*, 4 Ired. 368, where an officer elected to hold for four years, without any right to hold over, continued to exercise the duties of the office for about nine years, without re-appointment or re-election, an official act performed by him was sustained upon the ground that he was an officer *de facto*, acting openly and notoriously in the exercise of the office for a considerable length of time, and his act in the particular case, which was recording a deed, concerned the rights of third persons or the public, and was therefore deemed to be as valid as the similar act of a rightful officer.

"It is manifest moreover that an appointment may often be presumed upon evidence which would fail to justify presumption of a popular election, because it is an investiture of office less public in its nature, and the whole doctrine imparting validity to the unauthorized acts of *de facto* officers is one based on justice, necessity and public policy, and is intended chiefly for the protection of an innocent public who may be ignorant of the officer's defect of official title. *Joseph v. Cauthorn*, 74 Ala. 411."

BRADDY V. CITY OF MILLEDGEVILLE.

(74 Ga. 516.)

Constitutional law — ordinance prohibiting street walkers.

A city ordinance prohibiting disreputable women from standing or loitering about the streets or stores at night, unless on unavoidable business, is valid.

CONVICTION of night walking. The opinion states the case.

D. B. Sanford, M. Grieve, for plaintiff in error.

Robt. Whitfield, solicitor-general, by *J. H. Lumpkin*, for the State.

HALL, J. The defendant, who appears from the evidence to have been one of the most shameless of the class of depraved women to which it was shown she belonged, was found guilty by the municipal authorities of Milledgeville, and lightly punished for violating the ordinance of that city, that "All women of disreputable

Braddy v. City of Milledgeville.

character, commonly known as 'street walkers,' who may be found standing or loitering about the streets or stores of this city at night, and who cannot prove that they are on unavoidable business, shall be arrested, * * * and on conviction shall be punished by fine or imprisonment," etc.

She applied for a *certiorari*, which the judge refused to sanction, and to this refusal she excepted, and brought the case here by writ of error for review.

[Minor points omitted.]

We do not appreciate the force of the objection that this ordinance is violative of those clauses of the Constitution which it is alleged inhibit "class legislation." No such provisions have been pointed out, and we are unable to find them. It is the right as well as the duty of these municipal corporations to make and enforce regulations for the observance of public decency, as well as for the preservation of the good order, peace and health of the community. Such powers are necessarily incident to the object of their being; they are involved in the very idea of police regulations. Dill. Mun. Corp. 393. Could this constitutional objection be entertained, it would sweep from our statute book all the laws against bawdy-houses, gambling, thefts, lewdness, tippling, and almost every other species of offense that can be imagined. It is true we have no statute against "night walking," but such practices were inhibited by the common law (Whart. Crim. Law, 441), and tend strongly to vagrancy, lewdness and other offenses of that character which are inhibited by our Code. If such a provision was found on our statute book, this municipality could not exercise it. Its absence from the Penal Code justifies its exercise by the city authorities. 69 Ga. 503.

Judgment affirmed.

Ezzard v. Findley Gold Mining Company.

EZZARD V. FINDLEY GOLD MINING COMPANY.

(74 Ga. 580.)

Ejectment— for flowing lands.

Ejectment does not lie for flooding lands by a dam. (*See note, p. 447.*)

EJECTMENT. The opinion states the case. The defendant had judgment below.

Wm. Ezzard, in pro. per.; Henry B. Tompkins, for plaintiff in error.

W. P. Price, R. H. Baker, for defendant.

HALL, J. The question made in this case is, whether the lessor of the plaintiff, who has title to the gold and ore embedded in the land in question, with the right to enter thereon, and to the use of the water in the stream running through the premises, to enable him to mine the ore, can maintain ejectment against an adjacent proprietor lower down the stream, who has erected a dam across the same, by which the water is thrown back and submerges the land on which the mining right is situated, and by means of which the owner is prevented and hindered from making use of his property? The court below was at first of opinion that the action was proper, and refused a motion to non-suit, but subsequently, when a verdict had been returned for the plaintiff with mesne profits, and a motion was made for a new trial, upon various grounds, including the refusal to award a non-suit, the verdict was set aside and a new trial was ordered. Exception was taken to this judgment, and the case is here upon that exception for review.

We are of opinion that the non-suit should have been awarded, and having refused it, and a verdict having been rendered for the plaintiff, the court was right to correct the error by setting it aside and ordering another hearing. If the rights of the plaintiff were invaded by covering the land with the water backed in consequence of the defendant having erected his dam across the stream, and thus causing water to overflow the land in which the plaintiff had an interest, he was not without his remedy. In all cases of consequential damages, or "such as do not follow immediately upon the

Essard v. Findley Gold Mining Company.

act done," but "are the necessary and connected effect" of the same, "though to some extent depending upon other circumstances" (Code, § 3071), the party wronged has his remedy, and that remedy is an action on the case as contradistinguished from trespass. The cases and authorities showing the damages claimed here to be consequential, and declaring case the proper remedy to redress the injury, are collected and arranged in Angell on Water-courses, §§ 395, 396, 397, and 6 Wait Act. and Def. 312, 313.

A resort to an action of ejectment to vindicate such a wrong would seem, to employ the quaint but expressive language of Lord Coke, "to be a mere stranger in the law." The only analogous case which gives countenance to such a proceeding is *Sherry v. Frecking*, 4 Duer. 457, where it was held that the owner might recover in ejectment the space above his land, as when an adjoining building overhung it. This decision was put upon the principle that the common-law signification of land embraced all above and below it to an indefinite extent (a definition which has been carried into our Code, § 2218). It misapplied however, as we conceive, a correct principle, and was expressly overruled in a later case by the Supreme Court of New York, in which State it was rendered. *Aiken v. Benedict*, 39 Barb. 400. According to the justice who delivered the opinion in this case, this is the only instance which the books furnish where ejectment was sustained under like circumstances, either in England or the United States. It is further said: "The point appears by the report of the case to have been decided upon little or no consideration, and without referring to a single authority to show that ejectment would lie. The court admit that the claim is a novel one, but remark that they do not see why it is not well founded, or why, if A. builds over, though not upon, B.'s land, B. may not have his remedy by ejectment." But the Supreme Court did not so see it, and held that such a projection over the land of another was not such an encroachment upon his possession as would sustain an action of ejectment. And Mr. Tyler, on Ejectment, p. 38, deems the latter decision "more in harmony with the general principles of the action to recover possession of realty than the former," and thinks it may be regarded as the better law. And such is our own opinion; indeed, we do not clearly see how the sheriff could execute the writ of *habere facias possessionem*, which the judgment in favor of the plaintiff in ejectment awards, by removing the water from the premises and by

Gunn v. Gunn.

putting the plaintiff in possession. He cannot remove the defendant, for he has never been in possession, and by his plea disclaims any right thereto. Besides, although the plaintiff may recover the rents of the land along with the possession, and any damages done to his freehold in connection with its wrongful use, yet apart from these rents, he can recover no damages disconnected from them. 19 Ga. 583.

To avoid misapprehension as to the extent of this decision, it may be well to state that we do not hold that the owner of land covered with water, or of the mineral interest in such land, when either is held adversely, may not maintain ejectment for the recovery thereof. This is not the case before us. *Judgment affirmed.*

NOTE BY THE REPORTER.—The case of *Sherry v. Frecking*, cited in the principal case, is not overruled by *Aiken v. Ketchum*, there cited, for the Supreme Court has no power to overrule the Superior Court of the city of New York. It is simply disapproved. In the *Aiken* case it was held that nuisance and not ejectment is the proper action to remove projecting gutters or eaves.

In *Vrooman v. Jackson*, 6 Hun, 329, it was held that ejectment does not lie to remove a projecting cornice from a party wall, on the authority of the *Aiken* case. The test seems to be the tangibility of the property. So in *Nichols v. Lewis*, 15 Conn. 187, it was held that ejectment lies for land covered by water.

In *McCourt v. Eckstein*, 22 Wis. 153, it was held that ejectment lies to remove stones projecting from a foundation wall. DIXON, C. J., however was "strongly inclined" the other way.

In *Stedman v. Smith*, 8 El. & B. 1, ejectment was held to lie to remove a roof projecting over the whole width of a party wall.

GUNN V. GUNN.

(74 Ga. 583.)

Statute of limitations—mutual accounts.

In case of mutual accounts the statute of limitations does not begin to run until the last item on either side.

ACTION on account. The opinion states the case. The plaintiff had judgment below.

Duncan & Miller, for plaintiff in error.

B. M. Davis, for defendant.

CLARKE, J. On February 8, 1878, D. F. Gunn filed his action of complaint on account against his brother, U. M. Gunn. The bill of particulars thereto annexed is an itemized account, containing both debits and credits. The first item, dated February 25, 1867, is "by paid taxes \$395.55," being a credit in favor of U. M. Gunn. The second item is also a credit of "cash," about a month later. Then follow eight items of debits, amounting to about \$1,000, scattered along from May of that year to the following February. Then succeed about fifty large items, dated in almost every month down to the end of 1870, and nearly equally divided in number, between debits and credits. The last credit item is \$100 in cash, dated February 25, 1871. Beginning in the next month, and coming along in every year, except 1874 and 1875, appear debit items of large amounts of cash. There is one item in 1876, and the last one is \$30, February 14, 1877.

To this suit the defendant below pleaded the general issue, payment, and the statute of limitations, or the lapse of four years since the cause of action accrued. The jury found for the plaintiff a large balance.

[Omitting minor matters.]

The question whether the statement sued on was a case of mutual and reciprocal accounts, was a question of fact for the jury, and to them the judge fairly submitted it. They found it to be such. The defendant himself testified that up to 1873, the dealings between him and plaintiff were carried on "upon the mutual confidence basis." "I borrowed from him," says he, "and loaned him money; and he borrowed from me and loaned me money." The defendant also testified that he kept no written accounts of their dealings, but that his brother kept the account of both sides. This makes no difference. Thus it is conceded, that from its incipency until February 25, 1871, the case between the parties was one of mutual and reciprocal credits and debits. But defendant below insists that this quality of mutuality, or reciprocity, ceased at the date last aforesaid, because from that time, all the credits were on the other side; consequently he claims that the statute of limitations began to run in his favor from that time; and

that four years having elapsed from then till the filing of the suit, all of the items antedating that last credit in his favor are barred.

The charges complained of all assumed that the mere fact that the last credit to defendant was at the time stated, did not establish the cessation of mutual dealings; but that without the occurrence of something (as a stating, or settling of the accounts, or other act to show the intention to discontinue that sort of dealing), the account was to be regarded as still a mutual one down to the last item in favor of the plaintiff. It is true that in the terms used by the court, there was a failure to express that the mutuality of dealing might have been terminated otherwise than by a stating or settling of the accounts. The language of the judge was, that if "there had been no accounting or settlement * * * between the parties, nor statement of the account and balance struck," the dealings continued to be of the nature of mutual accounts. In the charges quoted in the third and fourth grounds, the terms used are, that if "there had been no settlement," the account, once mutual, continued so. We do not regard these charges as an accurate formulation of the law; nor were they so intended by the judge. Parties having mutual dealings may, at the option of either party, terminate the mutuality at any time, either by an actual ascertainment of balance and settlement thereof, by a statement of account by either party for the purpose of terminating it, or by any act plainly showing to the other party that he means no longer to deal that way. But this is a merely abstract criticism on the charges. The defendant below did not pretend that any thing had been done by either party to terminate the mutuality of the dealings, except the settlements and payments which he pleaded. If the jury had believed that such settlement had occurred, they would have been required by the charge to find against the subsequent mutuality. The charges were therefore substantially, and for the purposes of the case, correct, provided the law does not hold the mutuality to cease upon the last item of credit in favor of defendant. The plaintiff in error contends that the law does so hold, and consequently that the statute begins to run from the date of such item. Thus we reach the one question of law on which the cause depends.

The general doctrine, which takes the case of mutual accounts out of the operation of the statute, so long as the mutuality continues, was very early developed by the courts, as an equitable extension of the saving (in the first act of limitations, viz., the

statute of 21 James I, chap. 16) in favor of merchants' accounts. It was recognized that when parties, not strictly falling under the denomination of merchants, had a course of dealing so like that between merchants, consisting of mutual credits each to the other, the reason was the same for saving their accounts from the statute of limitations. The doctrine was also rested on the intrinsic equity of the case. But there is a conflict of authorities upon the question when that mutuality which protects against the statute ceases.

In 7 Wait's Actions and Defenses, 266, 267, it is said: "It is not sufficient that there are items on both sides of the account; there must be items within the period of limitations on both sides." Of like import is 2 Greenleaf on Evidence, § 445. The learned commentator first named cites several cases in support of this view. Those of them most directly in point are *Gulick v. Turnpike Co.*, 14 N. J. Law, 545, and *Belles v. Belles*, 7 Halst. 389. Both of these precedents coming from the Supreme Court of New Jersey, and the latter being cited in the former as one of the main leaders, let us first examine it. This was a case in which the judge below refused, when requested, to charge the jury, "that there was no evidence in the cause, from which the jury ought to infer a new promise to take the case out of the statute," and that all the items of plaintiff's account which were over six years old at the beginning of his suit were barred. Two opinions were delivered. EWING, Ch. J., says: "The three principal items of the debit side of plaintiff's state of demand were of long standing, the first in 1809, for work at farming by himself and horse; the second, in 1813, for money received by the defendant for a particular purpose and not so applied; the third, in 1817, at least thirteen years before commencement of the action, for the use of a wagon; and the remaining items are in July, 1824, for one day's labor of self and team; and the like in March, 1826. A credit is given for some clothes in the year 1809. Defendant pleaded the statute of limitations and a cross demand by a sealed bill of plaintiff to defendant, dated November 14, 1822, for two notes given by plaintiff to other persons (one in May, 1821), assigned to defendant at a time not shown, and for five items of account beginning in December, 1822, and giving credit to plaintiff for seven items of account, beginning June, 1823." Between those items of plaintiff's account which are more than six years before suit brought and those items within the statute, "no such connec-

Gunn v. Gunn.

tion subsists * * * as to give the whole the character of a running or current account. The plaintiff gives, indeed, a credit corresponding in date with the first charge, but the defendant claims no such credit, nor any demand or item of account against plaintiff earlier than the year 1822, unless it be the note given" (by plaintiff) "to Grover, which became due late in 1821, but when assigned to defendant we know not. If there had been no transactions between the parties after * * * 1817, and prior to suit, the items * * * of earlier date would surely be barred. The occurrence of some dealings, after a lapse of several years from 1817, wholly disconnected with the antecedent transactions, cannot save these from the prescribed limitation. But viewing the case as exhibited by the plaintiff in his state of demand, there were no subsequent dealings." [Doubtless the learned judge meant to say "no subsequent mutual dealings."] "He professes to give the credit to which the defendant is entitled. It is for a simple item more than twenty years prior to * * * the suit. If the plaintiff meant to avail himself of the legal effect of a current account of reciprocal demands of mutual dealings, he should have shown, or at least admitted, not peremptorily denied, that such account, demands or dealings existed."

We make this extensive quotation to show that this decision rests on other ground than the doctrine that the mutuality ends with the last item credited to defendant, or charged by him against plaintiff. It is evident, from both opinions that the court was passing on the question of evidence, whether it had been proved that the plaintiff's account, so far as it antedated the period of the statute, was an instance of mutual accounts. They held that the one credit allowed in plaintiff's statement to defendant, more than twenty years before suit brought and denied by defendant, did not prove that there were mutual dealings or reciprocal demands prior to about 1821 or 1822. They saw no "such connection" in the nature or circumstances of the plaintiff's account prior to 1817 and the items thereof in 1824 and 1826, "as to give to the whole the character of a running or current account." There was not, as in the case at bar, testimony that, prior to the long gap in plaintiff's account between 1817 and 1824, the parties dealt with each other "on the basis of mutual confidence." We do not feel called on to say whether we approve that court's decision as to the facts of mutuality. Chief Justice EWING seems to concede that, if that item of credit to de-

fendant in 1809 were established or admitted, it would be evidence of mutual dealings. It further appears, especially from the opinion of Justice DRAKE, that both in the court below (which was a justice's court) and in the reviewing court, the question was confounded with one about the sufficiency of a new promise to remove the bar of the statute. Such confusion of doctrines so distinct would greatly detract from the weight of the authority, even if the decision had been precisely on the question now before us.

In *Gulick v. Turnpike Co.*, from the same court, HORNBLOWER, Ch. J., cites *Belles v. Belles* as a main support to his ruling, and says that the rule is correctly stated therein. We have seen that *Belles v. Belles* does not go the length to which we shall see that court reaches in *Gulick's* case. There the justice says: "There must be mutual dealings and reciprocal demands within the six years. It is not sufficient that there are items on both sides of the account; there must be items within the six years on both sides, otherwise the dealings for the last six years have not been mutual, but on one side only. The charge made by the defendants in 1819 is evidence, *according to the artificial reasoning which has prevailed on this subject*" (the italics are ours), "that there then was an open and unsettled account between the parties; but it is not now evidence that the account up to that period still remains open and unsettled. So long as the defendants continued to make charges, so long they admitted an open account; but when they ceased to make charges the account ceased to be a mutual one. If we consider each successive entry as a new admission or promise, then, as in this case, there has been no entry on the part of the defendants since 1819; there has therefore been no such admission by them in six years of a pre-existing account." In this case, as in *Gunn v. Gunn*, now before us, the plaintiff's account showed no item in favor of the defendant within the statutory period, but showed some in favor of plaintiff.

Upon the authority just quoted, we have these criticisms to make: *First*, unquestionably it is in precise point; *secondly*, it is not fairly supported by the previous case of *Belles v. Belles*; *thirdly*, it is clearly based on a mistaken notion of the foundation of the doctrine which saves mutual accounts from the operation of the statute. To illustrate this last proposition, we observe that the judge quotes the language of Lord KENYON in *Catlin v. Scoulding*, 6 T. R. 189, one of the earliest authorities within our reach in favor of this

general doctrine. In that case there were charges in favor of each party within the statute, and Lord KENYON says: "I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterward to be ascertained, and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute."

The Supreme Court of New Jersey took this language as showing that the reason why the plaintiff's account, in any case, was saved from the operation of the statute was that the defendant had made an admission of outstanding accounts in favor of the plaintiff, in the nature of a new promise, capable of stopping the running of the statute, or even removing the bar already matured. They therefore concluded that nothing but the defendant's own words or acts could be construed into an admission or promise by him. The moment therefore when he ceased to make entries against the plaintiff, he ceased to make admissions against himself or new promises. The reasoning by which the general doctrine was supported by the courts (when so understood) was not inaptly termed by Justice HORNBLOWER, "the artificial reasoning which has prevailed on this subject."

Upon the same erroneous notion of the reason of the rule is founded that argument against the entire doctrine by which the court seems to triumph against it, in *Blair v. Drew*, 6 N. H. 235. The New Hampshire judge scouts the idea that a credit, entered by the plaintiff on his account of debits against defendant, can be construed into an admission by the defendant. He even goes further, and with unimpeachable logic maintains that even if defendant keeps an account against the plaintiff, a charge which he makes against the plaintiff cannot amount to an admission that he owes the plaintiff any thing. The reasoning is conclusive, but the heavy blows of the court's logic are laid upon a man of straw. It is not to be denied that the language of Lord KENYON, above quoted, gives much plausibility to such construction and such refutation. His infelicitous expression of a principle so long "well-settled" (doubtless, on that account, more unguardedly expressed) has been repeatedly followed by the courts. But it would be unjust to his learned lordship's common sense to suppose that he meant to say that an

entry made by one man could be construed into an admission by his antagonist, or that by charging on my book that A. owes me for a horse, I involve myself in an admission of owing him for a cow, or for any thing else. He said that each new item and credit in an account given by one party to the other is an admission," etc. He does not make the credit alone have that effect, but the effect springs from the combined light of the debit and credit. Neither is such an effect meant to spring from the mere fact that a debit and credit have been entered on an account. It is not the entering of fancied or false items for and against the party keeping the account. But it is the conceded or proved fact that each party has, on his part, both extended credit or trust to the other, and taken or received credit or trust from him. When such mutual dealing is shown to the court, it is, we conceive, scarcely accurate to say that it constitutes an "admission." It would have been better language to say that such a state of facts implies that the parties have mutually consented that each item, in whosoever favor it may be, shall not constitute an independent debt due immediately, to be paid or enforced at once, but that the items occurring from time to time, in favor of the respective parties shall operate as mutual set-offs, and that the shifting balance, when either or both shall call for it, shall be the debt. This is the reason why the statute of limitations does not apply during such a state of mutual dealings. As the parties have stipulated no time when their respective credits shall be due, their respective demands do not become due at any particular time. The right of action on them does not begin unless at the option of the parties as shown hereafter. Of course, time is not to be counted against either of them; nor can the reasoning by which such an understanding is implied be justly called "artificial" any more than the same epithet may be applied to every case of agreements or understanding, implied from the conduct of both sides. If I recognize and pay accounts made by my servant with a merchant without protest or warning, it is implied that I assent to be liable for his purchases there in my name. By my conduct, I have sanctioned a course of dealing, and authorized the merchant to rely upon it in future sales. So here D. F. lends cash to U. M., and does not demand a settlement of the debt, but borrows money from him. So each one proceeds, "upon the basis of mutual confidence," to lend and to borrow, without either party calling for a settlement. Such facts being ascertained, the court rationally infers from the

Gunn v. Gunn.

conduct of both sides that they are willing for whatever balance may at any time happen to be owing, not to be due, but to stand subject to be still further shifted by subsequent and similar dealings. Under such circumstances, neither party is allowed to take advantage of the other party's confidence by pleading the extent to which his friend or brother has been so encouraged and induced to extend it. It would be a fraud if allowed.

In Angell on Limitation, 136, it is said: "Mutual accounts are made up of matters of set-off. There must be a mutual credit, founded on a subsisting debt on the other side, or an express or implied agreement for a set-off of mutual debts. A natural equity arises, where there is an existing debt on one side, which constitutes a ground of credit on the other, or where there is an express or implied understanding that mutual debts shall be a satisfaction or set-off *pro tanto* between the parties." In *Abbot v. Keith*, 11 Vt. 525, the court says: "In ordinary cases of mutual dealings no obligation is created in regard to each particular item, but only for the balance, and the constantly varying balance which is the debt." In *Hodges v. Manly*, 25 Vt., 210, occurs like language: "It has uniformly been held that distinct and different items of charge in an open and mutual account do not constitute separate claims; but that the claim or debt is found in the balance of the account." In New York, mutual accounts are by statute, expressly excepted from the bar of time until six years from the last item. The Court of Appeals of that State, commenting upon the doctrine in question (in 79 N. Y. 1), declares that their statute is but an affirmation of the common law, and holds the following language as to the reason of the doctrine: "Where there are mutual accounts between two persons, it is always the understanding that the account upon one side shall offset that upon the other; and in law, the debt due from the one to the other is only the balance left after the application in reduction of the accounts on the opposite side. In any form of action, the recovery can only be for the balance. The very theory upon which this statute is based, is that the credits are mutual, and that the account is permitted to run, with the view of ultimate adjustment and payment of the balance * * * The action need not be in form, an action to recover such balance, if such be its purpose or legal effect." The "complaint" on account in Georgia is, in effect, just as an action.

If such be the real foundation of the doctrine, that the statute of limitations does not apply to mutual accounts, while the mutuality continues, it is evident that arguments and decisions, based on the false theory that it rests on "the artificial reason" of admission or new promise, ought to have little weight in determining to what matters its spirit, reason and purpose make it applicable. If such be the foundation of the rule, we perceive why the statute of New York, declaring, as the court held the common law provided, that the statute of limitations should begin to run from the last item in a mutual account on either side. The Supreme Court of that State (5 Lans. 137) decided this case. The defendant pleaded a set-off, beginning in 1855 and ending in 1863, against plaintiff's account, beginning in 1868 and ending in 1869. Plaintiff urged the statutory bar of six years against defendant's account. *Held*, that upon the principle of the mutuality of the accounts, the statute did not begin to run against either side till the last item, which was in plaintiff's favor in 1869. In 1 Smith's Leading Cases (H. & W.'s notes), *Truman v. Fenton*, it is held that, "When men deal with an express or implied agreement that what each sells or delivers shall, instead of giving rise to a demand payable at once, stand as a payment, or set-off, for what has been or may be received from the other, their liability will be limited to and depend upon the balance as finally disclosed, and the statute will not begin to run until the date of the last item."

We forbear to make more extensive quotations. The rule here laid down, though disregarded by some courts, on the erroneous reasoning already discussed, stands supported by the great mass of authorities. See 35 Am. Rep. 501; 79 N. Y. 1; 20 Wend. 72; 9 Wend. 125, 126; 6 Cow. 195; 7 Wend. 322; 5 Johns. Ch. 522; 5 Cranch, 15; 3 Metc. 216; 2 Mass. 217; 6 Pick. 364; 8 Pick. 187; 1 Hill, 292; 12 Tex. 374, 420; 18 Ala. 274; 2 Port. 351; 19 Miss. 42; 20 Miss. 13; 20 Mo. 13; 2 Blackf. 340; 4 Sandf. 329; 2 Sandf. 125-127; 1 Ohit. Pr. 777; Peake Cases, 121; 2 Esp. 569; 41 Ga. 44, 58, 66, 49, 54, 190; *Ford v. Clark*, 72 Ga. 769; *Flournow v. Wooten*, 71 Ga. 168.

In the argument of counsel, much stress was laid upon the fact of a hiatus between the items of the account, in this, that from 1873 to 1876 there is no item on either side. Our reply to that is that no hiatus less than the period of limitations could, of itself, operate as a bar, or even effect or demonstrate an annulling of the

implied understanding that each party might continue to credit the other upon the view of an ultimate adjustment of accounts. On the question of fact whether the parties had terminated that course of mutual dealing, we do not say that long gaps in the accounts might not furnish some argument to the jury, along with other circumstances tending to show the breaking up of such relations as mutual creditors. As to that, each case must stand on its own facts.

It has also been declared to be an absurdity that the plaintiff by charging one or two additional items, and those small ones, after a three years' interruption of dealings, could be held to have drawn the whole account against the defendant so far forward as to be out of reach of the statute of limitations. It seemed to counsel to give the plaintiff an unfair advantage. To this view we simply reply, that the defendant voluntarily so acted with the plaintiff, mutually borrowing and lending, as, in the opinion of the jury, to justify the implication of a treaty between them to deal with each other "on a basis of mutual confidence." This state of things being once established, the law and jury presumed its continuance till some evidence of its termination by both or either. Defendant could have ended it any day by demanding a settlement, or plainly refusing to deal any longer. But instead of taking steps to bring this mutual understanding to an end, it suited him better to take the benefit of plaintiff's reliance upon its continuance and obtain further loans. Such at least is the fair construction of the case, if we accept the jury's finding against his plea of payment or settlement.

We hold that either party could have paused at any item, and demanded settlement of the existing balance. Such a demand could have been made in legal proceedings by suit. But so long as both parties saw fit not to move in the matter, there was no principle of law to break up the treaty, save the statute of limitations running from the last transaction between them until four years before suit.

Let the judgment of the court below be affirmed.

Judgment affirmed.

JACKSON, C. J., concurred; BLANDFORD, J., dissented.

NALLY V. NALLY.

(74 Ga. 559.)

Insurance—change of beneficiary—delivery.

An unmarried man insured his life for the benefit of his sister, and delivered the policy to her. The policy was conditioned that he might change the beneficiary with the consent of the company. Subsequently he married, agreeing that if the woman would marry him she should be made the beneficiary. When he paid the next premium he paid it on condition that this change should be made. The sister would not give up the policy, and the change was not made. The insured having died, and the company having brought the sister and widow to interplead, *held*, that the widow was entitled to the fund.

INTERPLEADER. The opinion states the case.

Spears & Simmons, Hillyer & Bro. and Hoke Smith, for plaintiff in error.

Mynatt & Howell, J. R. Saussy, J. M. McAfee, for defendants.

HALL, J. The contest in this case is between a gratuitous beneficiary named in a policy of insurance, and one who claims that she was entitled, for a valuable consideration, to-wit, an agreement with the assured entered into prior to her marriage with him to its benefit, in lieu of the volunteer name therein as such beneficiary. Among other conditions upon which the policy issued was this:

“*Eighth.* This policy is issued and accepted upon the express condition that the assured may, with the consent of the company, at any time assign it, or before assignment, change the beneficiaries therein, or make any other change.”

The assured was an unmarried man when he took out the policy; the person named as beneficiary was his sister, to whom he delivered the policy; he paid the premiums. Subsequent to this he married the other claimant of the fund, with whom, before their marriage he agreed that if she would marry him she should be made the beneficiary thereof, and it was satisfactorily shown, and not controverted, that this contract, which was an inducement to the marriage, was made. After this, and on the day before the second semi-annual premium on the policy fell due the marriage was solemnized.

Nally v. Nally.

The assured sought out the agent of the company, and paid this premium upon the condition that the beneficiary should be changed from his sister to his wife. The sister had the policy and would not give it up because she was angry with the assured for having married. Without the policy the agent was uncertain whether the desired change could be made, but promised to report this direction to change the beneficiary to the officers of the company, and if possible to have the change made. He complied with his promise so far as to communicate the direction of the assured to the officers of the company, and requested them to attend to the matter, which they agreed to do. They however overlooked it, and nothing further seems to have been done until the death of the assured, which occurred before the next premium fell due; both the wife and the sister claimed the amount specified in the policy. The company filed its bill calling upon them to interplead; it paid the money into court, and they were decreed to litigate the matter between them; this issue was by consent tried by the judge without a jury, and he decreed the fund to the sister. The wife excepted to the decree, and brought the case to this court by writ of error. The controversy between the parties turns mainly upon the questions whether the sister, though a volunteer, held under a completely executed gift, and whether the change as to the beneficiary could be made without her consent and that of the company, expressed in writing, although the agreement to make it was founded upon a consideration of the highest value.

1. Was the gift to the sister perfected by the delivery of the policy to her, together with the receipts for the premiums paid prior to the contract entered into between the assured and his wife, which was an inducement to their marriage? Was the donation to the sister, under all these circumstances, irrevocable? Did the assured thereby deprive himself of the power either of assigning the policy, or of substituting for her another beneficiary? Was such his intention; and if so, was that intention communicated to the woman, who afterward became his wife, upon the faith of his promise that she should have the benefit of this insurance?

To constitute a valid gift, there must be the intention to give by the donor, acceptance by the donee, and delivery of the article given, or some act accepted by the law in lieu thereof. Code, § 2657. Actual manual delivery is not always essential to the validity of a gift, but the act from which it is inferred must indicate renuncia-

tion of dominion by the donor and transfer thereof to the donee (Code, § 2660); and while it is true that where the law requires a conveyance in writing to the validity of a gift, or the conveyance is made for a good consideration, the delivery of the article itself may be dispensed with, yet it is likewise true that it must be executed and delivered before it will dispense with the necessity of a delivery of the article given. Code, § 2659. If it is equivocal in its terms as to the renunciation of dominion, or if it contains a condition reserving the right to the donor to resume or change the possession, then the written conveyance, founded upon a good consideration, would not upon well-settled principles constitute a good and perfect gift, entitling the donee to the specific execution of the contract. It would in this respect be executory, and could not be enforced in favor of a volunteer. Equity never interferes in favor of volunteers, except where the contract is actually executed (Code, § 3116), and will never decree the performance of a voluntary agreement or merely gratuitous promise, unless the volunteer has gone into possession, and upon the faith of the agreement has incurred expense in making improvements of the property donated, or has done something of a similar nature which would render it inequitable upon the part of the donor not to carry out the contract. Code, § 3189, and citations. The donee must not be placed in a worse condition than she was before the gift was tendered. These provisions of our Code are obviously the annunciation of the established principles of equity, as will appear from the following authorities: *Ellison v. Ellison*, 6 Ves. 656; 1 White and T. Lead. Cas. marg. p. 167, in which it was held that "the assistance of the court cannot be had without a consideration to constitute a party a *cestui que trust* as upon a voluntary covenant to transfer stock, etc., but if the legal conveyance is actually made, constituting the relation of trustee and *cestui que trust*, as if the stock is actually transferred, etc., though without consideration, the equitable interest will be enforced." This distinction is fully maintained throughout the numerous cases set forth in the notes, both English and American, to White and Tudor's Leading Cases, *ut supra*, and is recognized and enforced by text-writers of authority.

Had the assured not reserved the right to change the beneficiary in this policy, and had he paid up all the premiums due or to become due before he delivered it to her, and had there been nothing further to be done by him in order to its perfection, then pe

Nally v. Nally.

haps it might have been deemed a completely executed trust; but such was not the case; she took the policy subject to the conditions stipulated upon its face; she had no right to restrict his selection of another beneficiary, and no power to compel him to continue the life of the policy by paying the premiums as they fell due; his failure to meet one of these would have put an end to the contract and would have terminated the conditional trust which he had created for her benefit; nor could she have prevented the forfeiture of the policy by paying the premiums against his wishes and when he forbade her doing it.

2. That marriage is a valuable consideration, and that an innocent purchaser on such a consideration will be protected even against a subsequent *bona fide* purchaser, seems too plain to require comment. Code, §§ 2741, 1782. Equity at least will never lend its aid to disturb such a purchaser. Code, §§ 3092, 3119. It will assist but never disarm him; and even though a title be obtained by fraud and be voidable as to parties whose rights were originally affected by it, it will be protected in a subsequent *bona fide* vendee who had no notice of the fraud. Code, § 2640. A striking instance of the application of this principle is afforded by the case of *Verplank v. Sterry*, 12 Johns. 536; s. c., 7 Am. Dec. 348, in which it was held that a deed, voidable in its inception on account of fraud and covin, might be rendered valid by matter *ex post facto*, as where a grantee in a voluntary deed gained credit by the conveyance, and a person was induced to marry her on account of the provision made for her in the deed; the conveyance on the marriage, ceased to be voluntary and became good against a subsequent *bona fide* purchaser for value, and this, whether any particular marriage was in contemplation at the time of the voluntary settlement, or the grantee married without the consent of her father, the grantor. This decision was in favor of the husband, but the rights of the wife stand upon the same equity. Marriage articles will be executed only at the instance of the wife or husband and other persons coming within the scope of the marriage consideration; but when executed at their instance, the court may also execute them in favor of volunteers, and all persons are volunteers except the parties to the contract and the offspring of the wife. Code, § 1781.

There is no condition in this policy requiring the consent of the beneficiary named therein to a change of any of its terms or of the parties entitled to claim under it, whether such change was to be

effected either by parol or by a written instrument; this was a matter entirely between the assured and the company, and if it chose to dispense with any of the modes to effect this purpose, this concerned no third party. The company does not insist upon a rigid compliance with the forms prescribed in the policy; and even if it had capriciously withheld its consent to the alteration which the assured desired to have made, and for which he received a valuable consideration, it is hardly to be questioned that it would be compelled, at the suit of the wife, to perform this contract specifically. Even in the case of a parol contract for the conveyance of land, specific performance will be decreed, if the defendant admits the contract, or if it be so far executed by the party seeking relief, and at the instance or by the inducements of the other party, that if the contract be abandoned he cannot be restored to his former position. Full payment alone, which has been accepted by the vendor, is such part performance as entitles the opposite party to a specific execution of the contract. Code, § 3187. In this instance, it would be impossible to restore the wife to her former position, if the contract were abandoned. She has paid, and the assured has accepted, the full consideration agreed on for the benefits to be derived from this policy. Equity considers that done which ought to be done, and directs its relief accordingly. Code, § 3086. It would be difficult to conceive a case which more imperatively demanded the advantages flowing from the application of this most just maxim than the present. Such being the view we entertain of the law applicable to the uncontroverted facts of this case, we are constrained to the conclusion that the money arising from this policy belonged to the wife and not to the sister of the assured, and that there was error in decreeing otherwise. It will be perceived that we place this decision solely upon questions of law, and that in our view of the case there was no necessity for a motion for a new trial in order to raise the points in dispute.

Judgment reversed.

CENTRAL RAILROAD V. CROSBY.

(74 Ga. 737.)

Negligence — contributory — engineer remaining at post.

It is not necessarily negligent in a locomotive engineer to remain at his post when a collision is imminent.

ACTION for death of husband by negligence. The opinion states the point. The plaintiff had judgment below.

A. R. Lawton and Lyon & Gresham, for plaintiff in error.

Bacon & Rutherford, for defendant.

JACKSON, Ch. J. The defendant in error sued the plaintiff in error for the homicide of her husband, who was an engineer on its road, running one of its trains, when the incident occurred. It seems, that in consequence of a feeble engine on one of the freight trains running on the same schedule that the train of which Crosby, the defendant in error's husband was the engineer, was also running, all the freight trains got out of their regular order, and got on the same schedule on which a passenger train was running; that an accident happened to this passenger train, causing it to lose or break a coupling-pin, and thus delaying it between Gordon and Griswoldville, and that Crosby's train ran into it while thus delayed, and he was killed.

The jury returned a verdict for \$12,000; a motion was made for a new trial; the counsel of plaintiff in error wrote off \$2,000, on their own hook; the court refused to grant a new trial, based on this ground and many others, and that refusal on all the grounds is assigned for error here.

[Minor points omitted.]

In respect to the issue of avoiding the catastrophe by leaping from the engine to save his life, we all agree that at such a moment, in charge of such a train, in view of passenger cars in his front, full of human life, to remain at his post in the hope of saving other lives would be an act of heroism so exalted as to constrain approval from all human hearts, and that courts, however cold and calm duty requires them to be in all cases, should place themselves

Central Railroad v. Crosby.

in the position of the engineer at the moment of such imminent danger, demanding such instantaneous decision and action, and should not scan closely the grounds of hope he may have had to save others, though risking himself in the effort. It is the policy of the carriers, as well as that of the great public carried rapidly by their trains, not to encourage the officer in charge of the engine that moves those trains to abandon his post in the moment of danger, but to reward the courage of remaining, if there be a hope, however slight, of saving two trains from collision and wreck and the lives of hundreds aboard. Whilst if there be no shadow of hope of averting disaster to others, the engineer should save himself, yet on a hope, however faint, for reasons, however inconclusively establishing the soundness of his conclusion that by risking his own life he would probably save other lives, he should remain at his post; and the act of heroism, though inoperative of good either to himself or others in the particular case, should be regarded as martyrdom to public policy, rather than want of precaution to save himself. No man needs much encouragement to save his own life. "Self preservation is the first law of nature." It requires kinship to Christ to die, or to risk death, to preserve the lives of others.

The reasoning of the Supreme Court of Wisconsin, in *Cottrill v. C. & M. and St. P. Ry. Co.*, 47 Wis. 634; s. c., 32 Am. Rep. 796, strikes us with great force, and the great principle of public policy alluded to above cannot be better enforced and illustrated than by citations from the opinion of that court in that case.

The court there says: "The very employment of the locomotive engineer, with its manifold and sudden and unexpected dangers, requires the highest type and best qualities of true manhood, invincible bravery, and great integrity * * * They are placed in charge of one of the mighty forces of nature, held in servitude by the most dangerous and intricate machinery, and great skill, unremitting attention, sleepless vigilance and fearlessness of danger are required to keep them in constant control. * * * The question which should determine their reasonable care or want of care is, how careful and prudent locomotive engineers would ordinarily and commonly act at such a time, in such a place and such circumstances, and not how firemen or other employees would or should. * * * It will not do to establish a rule by which the duty of an engineer in such an

Varnedoe v. State.

emergency may be measured and dictated by cowardice and timidity, and by which his standing at his place and facing danger will be carelessness and negligence. Who shall sit in judgment upon this brave engineer, to coolly determine the alternative risks and chances which he is compelled to take instantly, with scarcely a moment for deliberation, in such a terrible emergency? The defense resting upon such a theory in this case cannot be sanctioned, although cases may possibly arise in which even the common prudence of an engineer might require him to leave his engine to escape danger; but such cases will be rare exceptions, and depend upon very peculiar circumstances."

The facts of that case are quite similar to this. There, as here, the fireman jumped and saved his life. There, as here, there was imminent danger of a collision. There, as here, it did occur, and the engineer was killed, with hand on throttle, trying to check and control his powerful machine. There the decision is squarely that the defense was untenable. And we hold, with that court, that it must be clear, from the facts, that the engineer could not, with any degree of probability, be of service at his post, before courts should hold it want of common care for him to brave danger and stand at his post.

Judgment affirmed.

VARNEDOE V. STATE.

(76 Ga. 181.)

Trial—court questioning witness.

In a criminal case, it is the duty of the presiding judge to question reluctant witnesses, if necessary to elicit the truth.

CONVICTION of manslaughter. The opinion states the case.

S. B. Spencer and *W. A. Way*, for plaintiff in error.

C. D. Hill, solicitor-general, for State.

HALL, J. The defendant was tried for the murder of Asbury Whitehead, and upon being convicted of voluntary manslaughter, moved for a new trial, upon nine different grounds, which, after argument and consideration, was refused.

[Omitting minor points.]

VOL. LVIII — 59

In reference to the questioning of a witness by the court, we have to remark, that while it is the privilege of counsel, it is the duty of the court to propound such questions to reluctant witnesses (as the one in question had shown himself to be) as will strip them of the subterfuges to which they resort to evade telling the truth. *Kelly's case*, 19 Ga. 425, 426. The rule was still more broadly laid down in *McGinnis' case*, 31 Ga. 261, 262, where it was held that it was not wrong for the presiding judge himself to interrogate the witnesses; that it was not only his privilege to do this, but his duty likewise, whenever he desired to ascertain a fact with a view to the correct administration of the law. In *Epps' case*, 19 Ga. 102, 118, 119, it is said: "We know of no limit to the right which belongs to the court of interrogating witnesses, either in civil or criminal cases, particularly the latter: The life or death of a man may hang upon a full development of the truth. The presumption that this liberty will not be honorably and impartially exercised is not to be tolerated for a single moment. Counsel, in their zeal to acquit their clients, seem to take it for granted that the only object of courts is to convict. Until called upon to discharge the solemn and responsible functions of a judge, they never can appreciate the high sense of obligation under which they act to God and their fellow citizens. 'Thy life for the murderer's life, if he escape,' is the solemn denunciation of the Almighty! When they see therefore that a material fact has been omitted, which ought to be brought out, it is not only the right, but the duty, of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution, his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly. And let it be remembered that counsel seek only for their client's success, but the judge must watch that justice triumphs."

It is impossible to examine this record without being impressed with the evident reluctance of the witnesses, on whom the State had necessarily to rely, to testify in its behalf; indeed this was so apparent that the judge, in several instances, felt bound, in the exercise of that discretion with which he is invested, to allow the counsel for the prosecution to wring from them the truth by propounding leading questions, and in the particular instance, where he took the witness in hand, it was quite apparent that the witness held back and sought to keep out of the way, and during his examination did not readily and fully respond to the questions asked

Durdin v. Hill.

him. The judge by his examination, sought to ascertain the cause of his unseemly reticence. Had he gone further, and reproved him for his indecorous conduct, he would not have transcended the limits of his duty. *Thomas' case*, 27 Ga. 288, 297.

Judgment affirmed.

DURDIN V. HILL.

(75 Ga. 288.)

Landlord and tenant — crops on shares — title.

When a tenant rents land and agrees to pay the landlord a part of the crop in kind, and actually delivers a part of it, the title thereto is in the latter, and is not subject to a judgment against the tenant.

THE opinion states the case.

Foster & Butler, for plaintiff in error.

Calvin George, by *J. A. Billups*, for defendant.

JACKSON, C. J. The question made by this record is this: When a tenant rents land, and agrees to pay the landlord a part of the crop in kind, and actually delivers a part of it, which is levied upon by a general judgment creditor after the delivery, and claimed by the landlord, is the title thereto in the landlord, or still in the tenant, subject to judgments against him?

Upon principle it must be that the tenant may pay his landlord in kind according to his contract with the landlord, and need not wait for the latter to foreclose his lien and levy upon the crop. If the landlord's lien on the crop had been foreclosed, or distress warrant had been issued, and this cotton been levied on or the proceeds claimed, there can be no doubt that the landlord's lien would first be paid. Where the part of the crop to be paid the landlord in kind is fixed by contract between the two, why should not the tenant pay in kind by delivery of it, and the landlord not be forced to distrain, when the tenant is willing to pay him without levy or costs?

By the contract between the two in writing, 1,000 pounds of lint cotton was to be paid to the landlord for rent. If he had

Rome Railroad v. Wimberly.

paid it in money, it being payable in money, certainly it would have been good payment; if in silver, or any other sort of money, as bills of certain character, the payment would be good; when it is agreed to be in cotton and is paid in cotton, why is it not good as payment, and why does not the title pass when the payment in cotton is completed by delivery? We cannot see why title does not pass.

It is true that in *Stallings v. Harrold*, 60 Ga. 478, relied on by defendant in error, this court decided that a factor's lien on the crop — the whole crop — for advances, etc., could not be paid by delivery, but that the factor must proceed by foreclosure, and claim the money when the crop was gathered and sold. But that was a factor's lien, not a landlord's. That was a general lien on the crop, not a bargain to pay a part of it in kind. That was no contract to pay in kind at all, but "a certain written obligation, with lien on the crops of all kinds to be raised the then present year." It was nothing but a lien on crops to secure the payment of a draft for money. This is a contract to pay 1,000 pounds of cotton, lint cotton, for rents, and when it was paid — delivered, the only way to pay in cotton — it passed title against all the world to the landlord.

We think therefore that the court erred, and that the cotton delivered by the tenant to the landlord in payment of rent in cotton, as stipulated in the contract, belongs to the landlord, the claimant here, and is not subject to the judgment creditor's debt.

Judgment reversed.

ROME RAILROAD V. WIMBERLY.

(75 Ga. 316.)

Carrier — baggage — delivery.

The plaintiff travelled a part of the way to her destination by the defendant's railroad, and on the next morning resumed her route by another connecting road, which used the same baggage-room and platform as the first, her trunk remaining in the baggage-room all night, and she retaining the check; before the train on the second road left, an employee of the first took the check, agreeing to place the trunk in proper position for transportation; but on reaching her destination, it was discovered that it had not been put on board the train, and it was never found. *Held*, that the defendant was liable.

Rome Railroad v. Wimberly.

ACTION for lost baggage. The opinion states the case. The plaintiff had judgment below.

Junius F. Hillyer and *D. S. Printup*, for plaintiff in error.

C. A. Thornwell and *C. N. Featherston*, for defendant.

HALL, J. The plaintiff took passage on the Western and Atlantic railroad from Atlanta, and at Kingston, by the Rome railroad, to Rome. She paid her fare, and had her baggage, a lady's Saratoga trunk containing her wearing apparel, checked to the latter point, which she reached, and where she spent the night. Her trunk was not carried to the hotel where she lodged, but remained in the baggage-room at the depot of the Rome railroad. The next morning she went to the station for the purpose of pursuing her journey on the East Tennessee, Virginia and Georgia railroad to Prior's; a way station on that road in Polk county, Georgia. At Rome both these roads used the same baggage-room, and the platform thereto attached for putting off and taking on passengers and their baggage and for taking care of and storing baggage. Preparatory to her departure, the plaintiff handed her check to a friend, and requested him to get her trunk and place it in position for transportation to her point of destination on the East Tennessee, Virginia and Georgia railroad. The check was delivered to Ramsey, an employee of the Rome railroad, and the trunk was brought out of the room, placed upon the platform, and he was instructed as to the disposition to be made of it. He consented to follow these instructions, and the gentleman giving them left the depot to attend to some business elsewhere before the arrival of the train the plaintiff was to take, and which she did take. Upon reaching her station, she found that her trunk was not on board the train, and had not been put on. At that time, the road gave no checks for baggage which was to be delivered at way stations; consequently she had none. On visiting the depot at Rome that afternoon, Mr. Trout, who had courteously aided the plaintiff in placing her baggage on the platform, made inquiries about the matter, and was informed by this employee that the trunk had been left behind, and had been put back in the baggage-room. A demand was made for it previously to the commencement of suit, but it could not be found, and the defendant's servants being unable to give any account of it, the plaintiff brought

suit against both roads for the recovery of it and its contents. Upon the trial of the case, the jury returned a verdict in her favor against the Rome railroad for the full proved value, and against her and in favor of the East Tennessee, Virginia and Georgia railroad. The defendant against which this verdict was found moved for a new trial upon several grounds, only one of which assigns any error in the charge, or excepts to any ruling of the court; the others are the general grounds. The motion was overruled, and the new trial refused, upon each and all the grounds taken therein, and the movant prosecuted this writ of error to have this judgment reviewed.

It does not appear that this trunk was ever out of the possession of the agents of the Rome Railroad Company, or that it was ever delivered to the plaintiff, or, in accordance with her directions, to the East Tennessee, Virginia and Georgia railroad. This aspect of the case was not given in charge or submitted by the court to the jury. The defendant, upon this part of the case, was held liable "only for gross neglect." It cannot, and does not, complain of the charge in this respect; in our opinion, it was too favorable, and was more than it was entitled to under the law.

1. Under the circumstances in proof, it was bound to a higher degree of diligence than that given in charge, in the case of this baggage. While in its possession for that purpose, it undertook to deliver it on board the East Tennessee, Virginia and Georgia railroad train, on which the plaintiff was then about to pursue, and shortly thereafter pursued, her journey to her point of destination. The well-settled rule seems to be, that "so long as the custody of the baggage is incident, either to a past or prospective transportation of the passenger, the company must be regarded, at the least, as bailees for hire, the fare paid extending both to the transportation of the passenger and his baggage, and the storage of the latter for a reasonable time afterward, so as to meet any ordinary exigency of travel." 2 Redf. Ry. 44, 45; Schouler Bailments, 514, 515, 516.

The court charged that the storage of this baggage for a night was not, under the circumstances, for an unreasonable length of time; but he should have gone further, and charged that if it was removed the next morning from the room to the platform, for the purpose of being sent forward with the passenger on the other road. and the company's agent undertook to perform this duty, but neglected

Rome Railroad v. Wimberly.

it, the company would be liable — if not as a common carrier, for want of extraordinary care, it was at least liable as a bailee for hire, for want of ordinary care. Any other rule would, it seems to us, impose upon passengers a duty which the company has been paid to perform, and would, at all events, subject them to serious inconvenience, and perhaps to loss, without fault on their part, and for which they could have no adequate redress.

2. But even if the court was right as to the degree of care the defendant was bound to bestow upon this baggage while temporarily under its control, then we are satisfied that it could not relieve itself of responsibility without in some manner accounting for the loss and showing how it got out of its custody. Its failure to do this would warrant the inference that it was stolen by its servants, or was lost in consequence of their gross neglect. This action was based upon the negligence of the defendant's agents. The trunk was last seen in their possession; the failure of the company to produce a thing bailed, upon demand, *prima facie* established negligence and want of care. "Where there is a total default to deliver the goods bailed, on demand, the *onus* of accounting for such default is on the bailee." The charge of negligence is not fully met by evidence produced to show that the building used for the storage of baggage was safe and secure, in charge of trusty agents and servants, and properly guarded by day and night. It should go further, and show how this particular trunk got out of the possession of the company. "If it had been burned or stolen without fault on its part, the defendant would not have been liable. The evidence certainly shows a commendable vigilance in the general arrangements to protect this class of property, but it fails to point out how or by what means this trunk was lost. The inference that it was delivered to the wrong person by mistake is quite as legitimate as that it was stolen. To say that the servants were generally careful does not establish, as a question of law, that they were not careless in respect to this article. It was incumbent on the defendant to show that the loss of this trunk was not attributable to the want of care of its servants, and the evidence was such that the jury was justified in finding that it had failed to do it." *Burnell v. N. Y. Cent. R. Co.*, 45 N. Y. 184; s. c., 6 Am. Rep. 65, and citations. The defendant's exception to the charge of the court that follows is not tenable, under this exposition of the law, which, we think, is sound and altogether correct in laying down the rule that should

govern in cases where the responsibility arises from gross neglect only: "If the other road (the East Tennessee, Virginia and Georgia) went off and left the trunk, and Ramsay, defendant's agent, took it and put it back in the baggage-room, then it would be liable only for gross neglect." Neither this nor any other portion of the charge, so far as the defendant is concerned, upholds the specific objection made, that the court assumed, without evidence and contrary to law, that Ramsay's act in resuming possession of the trunk was binding upon the defendant company. The evidence authorizing this inference against the company was ample, and the law from which it arises, as we have seen, is clear and altogether satisfactory.

Judgment affirmed.

PATTERSON V. COLLIE

(75 Ga. 412.)

Judge — disqualification by affinity.

In an action of ejectment, one of the plaintiff's lessors died pending the suit, leaving a will, in which his widow and others were appointed executors. The executors became parties to the suit. Before the trial, the widow died, having previously received all of the estate of her husband to which she was entitled. After her death, the suit proceeded in the name of the surviving executors. The presiding judge had been related to the widow within the fourth degree of consanguinity. He was elected judge after the death of both the husband and wife. *Held*, that he was competent to preside on the trial.

EJECTMENT. The opinion states the case.

W. A. Little, W. C. Worrill, J. L. Wimberly & Son, and T. D. Hightower, for plaintiff in error.

W. D. Kiddoo, for defendants.

HALL, J. William A. Rawson, one of the plaintiff's lessors, died pending the action, leaving surviving him his widow and one child by a former marriage, and also leaving a will, in which the widow and others were appointed his executors. The will was proved, and the executors named qualified, and became parties to the suit in lieu of their testator. Before the case came on for trial, Mrs.

Rawson died, she having previously received all of her husband's estate to which she was entitled; after her death, the suit proceeded in the name of the surviving executors. Judge Fort, who presided at the trial, was related by blood to Mrs. Rawson within the fourth degree of consanguinity, and was consequently related to her late husband in the same degree by affinity. He was elected judge after the death of both these persons, but at the time of the trial, he bore no such relation to any of the parties to the suit, or to any one having any interest whatever in the subject-matter of the same or in Mr. Rawson's estate. When the case was called for trial, objection was made to his presiding, on account of his past relationship to these parties. Anxious to avoid any thing like an appearance of partiality or prejudice in the conduct of the suit, and to preserve both himself and the tribunal over which he presided from the appearance of suspicion, he asked to be excused from the performance of this duty, and suggested that the parties select some one as judge *pro hac vice* to preside in his stead. This suggestion was declined, for the reason that such an agreement could not be lawfully made, unless he was disqualified. He was thus forced to pass upon and determine his own qualification to act as judge. When the alternative was presented between the inclination of a magistrate, sensitive of his own reputation and that of the court over which he presided, on the one hand, and his duty to the public and to parties, on the other, and being convinced of his own eligibility to perform this duty, he could not hesitate as to the course he ought to take. He investigated the question carefully, and after full argument, concluded very properly, as will be seen, that it was his duty to act at the trial, and this made the first ground of the exception.

We are satisfied that the result reached was correct; that there was no good reason in law or in fact why he was not competent to afford the parties litigant a fair and impartial trial, and why he was not in a position to shield both himself and the court from the imputation of improper conduct. The caution with which he proceeded, and the thorough and patient investigation given to the subject, under the most trying and embarrassing circumstances, should have been sufficient to disarm the suspicions of even the most censorious. While it is true, that under our law (Code, § 205), a judge or justice cannot sit in any cause or proceeding, where he is related to either of the parties within the fourth degree

of consanguinity or affinity, or in which he or his relations have any pecuniary interest, or in which he has been of counsel, without the consent of parties, and while we are impressed with the importance of affording to parties a trial free from partiality or bias on the part of the presiding magistrate and others engaged therein, and we shall strenuously insist that the administration of justice shall not only be pure, but above suspicion, yet we are not prepared to go to the length of holding, that if the facts from which these unfavorable inferences may be deduced have ceased to exist at the time of the trial, and cannot therefore possibly come into operation, they are sufficient to disqualify the judge, and to relieve him from the duty of affording the parties an early opportunity of having their case tried.

The precise question made has never before, so far as we are informed, been presented for adjudication by our courts, but there are not wanting analogous cases involving principles that bear upon the point under consideration. In *Deupree v. Deupree*, 45 Ga. 414, a widow, who was a party to a marriage contract with her deceased husband, which together with another instrument was subsequently propounded as his will, was held a competent witness upon the trial of a *caveat* to the same, especially when she had barred herself from taking any thing from his estate. The principle established by this decision was thought applicable to a case in which the qualifications of a judge of the superior courts was called in question, on account of his supposed affinity to one of the parties. There the widow of the brother of the judge's wife was married to the defendant; the marriage of the judge having taken place after the brother's death, and before the second marriage of the widow, he was held not to be disqualified because of such relationship. *Furt v. West*, 53 Ga. 584. In *Oneal v. State*, 47 Ga. 230, 248, a juror, who had married the widow of the prosecutor's uncle, was held not to be incompetent on that account to serve on the trial.

According to the strictest rule of the common law in cases closely analogous, it would seem that affinity, where the party was dead, toward whom the presiding magistrate or sheriff summoning a jury bore that relation, would not amount to a disqualification, especially where no widow or child survive him who might have an interest in the subject-matter of the controversy. Lord Coke, in his Commentary upon Littleton, 156 (a), says a challenge to the array of jurors lies where the "sherife or other officers be of kindred or affini-

tie to the plaintife or defendant, if the affinitie continue." In *Munson v. West*, 1 Leonard, 88, it seems to have been held necessary to the continuance of the husband's affinity, that he should have had issue living by the wife, though she be dead, and it matters not that such issue should be heritable to the land, where that was the subject of the action. The text of Coke and the determination in the case from Leonard seem to have furnished the rule upon which the courts of this country have most usually acted when dealing with this question. See *Cain v. Ingham*, 7 Cow. 478 and note (a) there, which collates and classifies most of the authorities and cases upon the subject; also *Carman v. Newell*, 1 Denio, 25; *Higbe v. Leonard*, 1 Denio, 186; *Matter of App. of Receiver D. and S. Mfg. Co.*, 77 N. Y. 101.

The case most directly in point is *Town of Winchester v. Hinsdale*, 12 Conn. 87, in which it was held, where a party to the suit had married the aunt of the judge before whom such suit was tried, but before the commencement of the same she had died leaving issue, who, as well as the husband, were living at the time of the trial, that the judge was not thereby disqualified to officiate in the cause. This is the judgment of an able and distinguished bench, founded, it is true, upon the statute of the State, but which, as far as it goes, does not differ from our own as will be seen when reference is had to the opinion in full. Mr. Justice CHURCH, who delivered the opinion (p. 92). says: "We are equally well satisfied that no such relationship existed between Judge Burrall and Martin Rockwell, Esq., as disqualified the former to give judgment in this case. In England no relationship existing between a judge and a party is a disqualification. A judge is presumed to be impartial and uncorrupt. By our law the relationship of uncle and nephew, by nature or marriage, disqualifies a judge. Stat. 148, tit. 21, § 38. By the marriage of his aunt with Rockwell, Judge Burrall became nephew by marriage to that gentleman; but the dissolution of the marriage by the death of the aunt dissolved the relationship of uncle and nephew, which had been constituted by the marriage. The circumstance that children of the marriage survive does not, in our opinion, operate to continue the affinity; for although Judge Burrall and Mr. Rockwell are in different degrees of consanguinity related to the surviving children, we see not that from this cause they are connected in any degree of affinity with each other. 1 Bl. Com. 436.

Jemison v. Southwestern Railroad.

Though the facts in our case do not require us to go to the length of this decision, inasmuch as both the kinswoman of the judge and her husband were dead when he took charge of the case, and she left no child or other descendant by him, and had been settled with for all she was entitled to in the estate, yet we are much impressed with the sound sense and satisfactory reasoning of this decision. To multiply disabilities by a more than doubtful construction, when none are created by the words of the statute, we apprehend, would be as unwise as it is impolitic and harmful. The admirable sagacity of our British ancestors in extending to their judges the fullest confidence, and discouraging every thing like distrust of their integrity and wisdom, has been amply vindicated by results. In their long career as a government, there has been but one miscreant like Jeffreys, and but a single instance of moral infirmity like that of Bacon. This generous confidence has promoted, if not created, a pride of character and a pride of places, that has secured an incorruptible and efficient administration of justice and has afforded ample protection to every right of the subject and the crown. It has made England, in this respect, a light to the world, and the admiration, if not the envy, of other nations.

[Omitting minor points.]

Affirmed.

JEMISON V. SOUTHWESTERN RAILROAD.

(75 Ga. 444.)

Animals — property — dogs.

No action lies for negligently killing a dog.*

ACTION for killing a dog. The opinion states the case. The defendant had judgment below.

S. H. Jemison, in propria persona, for plaintiff in error.

Lyon & Gresham, for defendant.

HALL, J. This was an action on the case to recover damages from the railroad company for negligently running its engine and train of cars over and killing a pointer dog belonging to the plain-

* See *State v. Harriman* (75 Me. 563), 46 Am. Rep. 433.

Jemison v. Southwestern Railroad.

tiff. At the trial, the court, on motion, nonsuited the case, as it seems, upon two grounds: 1st. Because dogs are not property in the general or legal acceptation of that term, so as to entitle the owner to maintain a suit for their destruction or injury by negligence, especially where the defendant is a railroad company, and the alleged damage results from the running of its locomotive or cars, or the use of other machinery belonging to it; and in the case of a dog, the ordinary presumption does not arise that the injury, upon the fact being shown, was the consequence of a want of ordinary care and diligence on its part. 2d. Because the facts in the case show that the killing of the dog could not have been avoided by the use of all ordinary care and diligence on the part of defendant's employees in charge of the train, he having jumped upon the track so near to the train that it was impossible to check its speed and to prevent its running over and killing him.

1. That a dog is not property, except in a qualified and restricted sense, and for certain specified purposes, is undoubtedly true, both at the common law and under our statutes. That the owner, by the common law and under our Code, may maintain trespass *vi et armis* for wantonly and maliciously killing his dog, is not questioned, but it is equally clear by that law that he could not maintain case for its unintentional, though negligent, destruction. By that law, such an animal is not the subject of larceny, and slander could not be brought upon a charge of stealing a dog. By an express provision of our statute however all "domestic animals fit for food, and also a dog," are made "subjects of simple larceny." Code, § 4402. Dogs are not generally the subjects of taxation. The Constitution of 1877, Code, § 5181, after declaring that taxation shall be *ad valorem* on all property within the limits of the State subject to be taxed, and that the tax shall be levied and collected under general laws, empowers the general assembly to "impose a tax upon such domestic animals as from their nature and habits are destructive of other property," and this, with other particular and special taxes enumerated, is set apart and appropriated for the support of common schools. Code, § 5206. Dogs are not property in such a sense as makes them assets belonging to the estate of a deceased person, and are never inventoried and appraised, however numerous or valuable, nor are they subject to levy and sale, so far as we are informed. Railroad companies are held liable to the owner for any damage done to live stock or other

Jemison v. Southwestern Railroad.

property by the running of cars, locomotives or other machinery upon their roads, under § 3042 of the Code, and by § 3033 thereof, the damage must be done in like manner and by the same means, "to persons, stock or other property," in order to raise this liability; and as the presumption of negligence is in all cases against them, the burden is put upon them of showing that their employees were in "the exercise of all ordinary and reasonable care and diligence" at the time the damage was done, to relieve them from the consequence of the act.

A like rule prevails in South Carolina as to the kind of property damaged and the conditions of the liability incurred thereby, and the question raised here came before the Court of Appeals of that State in *Wilson v. Wil. & Man. R. Co.*, 10 Rich. Law, 52, in the year 1856, and was, by a unanimous court, composed of able and distinguished judges, adjudged adversely to the plaintiff. They held that while a *prima facie* case of negligence was made out against a railroad company when it was shown that cattle, pasturing on uninclosed land, were killed by the running of its trains, yet that this rule does not apply where the animal killed was a dog. We are satisfied both with this result and the reasoning by which it was sustained; it is precisely in point, and leaves nothing to be added.

Dogs seem to have no market value, and the rule of damages in the case of live stock killed by the running of trains could not be applied to them. In case of their wanton and malicious killing or injury, a different rule for ascertaining damages obtains; the act is one which may be compensated by general or exemplary damages.

2. It is evident from the facts in this case that no exercise of care on the part of the employees of the defendant would have availed to have averted the calamity to this valued pointer dog.

Judgment affirmed.

Green v. Watson.

GREEN v. WATSON.

(75 Ga. 471.)

Constitutional law — exemption — wages — waiver.

The constitutional exemption of wages from garnishment may not be waived as to all future wages.*

GARNISHMENT. The opinion states the case.

John V. Edge, B. G. Griggs, R. M. Holley, for plaintiff in error.

Thos. W. Latham, C. D. Camp, for defendant.

JACKSON, C. J. The question made in this record is, whether a waiver of the right to have a laborer's wages exempt from garnishment is binding upon him, when the waiver is general and extends indefinitely to all his future wages. The waiver is in the following words:

"And I hereby contract and expressly waive the exemption of my wages or salary from the process of garnishment under the laws of Georgia, or to the exemption of my daily, weekly, monthly or yearly wages or salary from the operation of the garnishment law, in case this note is not paid promptly at maturity."

This waiver, it is thus seen, extends *ad infinitum* to all that the laborer may make by any employment in any sort of labor from any employer, and payable daily or weekly or monthly or yearly, and it is as general and sweeping as it is possible to make it. In *Stafford v. Elliott*, 59 Ga. 837, prior to the adoption of the present Constitution, this court held that this could not be done even in the case of a waiver to take exemption and homestead to secure a promissory note, where the waiver was general and extended to all the property of the debtor. In the case at bar, it extends to all the money he can ever make by his labor, and as this class of laborers generally have no property but their earnings, it extends to all his property that he can possibly acquire. The principle ruled in *Stafford v. Elliott* is, that a general waiver, to secure a promissory note, of the right to take homestead and exemption, embracing all the property of the debtor

* See *Recht v. Kelly* (82 Ill. 147), 25 Am. Rep. 301; *Carter's Admr's v. Carter* (20 Fla. 558), 51 Am. Rep. 618.

in esse and to be acquired, could not, under the law as it stood before the Constitution of 1877 allowed such a waiver, prevent the debtor from applying for homestead, though, when he signed the note and waiver he owned the land out of which he sought it. There being nothing in the Constitution of 1877 permitting the waiver of the garnishment law, the principle then ruled covers, *a fortiori*, this case; for if the debtor could not waive a right which required an application to the ordinary, or in other words, which required suit by him to assert and set apart homestead, much less can he waive a right which he need not sue for and set apart, but standing on the law which has already set apart for him all his wages, he need do nothing but defend by citing that law.

Section 10 of the Code, which permits certain waivers of legal rights, was in the Code when *Stafford v. Elliott* was decided, and if that section would allow such a waiver as this is, it would also have applied to the general waiver in that case; yet the effect of that judgment is that the public interests or policy would not permit it, if embracing all a man had; and so the same policy would not permit it, if embracing every thing the laborer could make. The conclusion we reach is, that this waiver is not binding, but void.

Whether any special waiver of these laws upon specific wages in a certain employment and for a certain time, by specific orders on employers containing such specific waiver, would be good, we do not decide, it not being necessary to do so, because the ruling as it stands meets the case made, and "sufficient unto the day is the evil thereof."

Judgment reversed.

DANFORTH V. STATE.

(75 Ga. 614.)

Criminal law — insanity — rule of evidence.

Where insanity is pleaded as a defense in a criminal case it must be proved beyond a reasonable doubt.*

CONVICTION of murder. The opinion states the case.

* See *State v. Bundy*, ante, 262.

Danforth v. State.

R. S. Lanier, Hardeman & Davis, S. H. Jemison, W. Dessau and C. L. Bartlette, for plaintiff in error.

Clifford Anderson, attorney-general, by J. H. Lumpkin, J. L. Hardeman, solicitor-general, and Bacon & Rutherford, for State.

HALL, J. [Omitting other questions.] The charges requested, as set forth in the eighth, ninth and tenth grounds of the motion for a new trial, were properly refused. They lay down the rule that the prisoner's sanity must be shown by the same amount of proof that is required to establish guilt in all other cases, that is, to the exclusion of all reasonable doubt; this is somewhat varied in each of these requests, by the employment of "sanity" and "insanity" interchangeably, and as meaning the same thing, but all eventuating in the announcement of this rule which appears to us both unsound and dangerous. The cases upon this subject are very conflicting and in a state of considerable confusion. They are all however American cases; indeed, it seems that this principle here announced, as was said by STONE, J., in *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 201, "is purely of American origin." Three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity.

The first is that insanity, as a defense of confession and avoidance, must be proved beyond a reasonable doubt, and that unless this be done, the jury — the case of the prosecution being otherwise proved — are to convict.

The second is that the jury (at least to find an affirmative verdict of insanity) are to be governed by the preponderance of evidence, and are not to require insanity to be made out beyond a reasonable doubt.

A third view, sustained by several authoritative courts, is that in such an issue the prosecution must prove sanity beyond a reasonable doubt.

This is Dr. Wharton's analysis and classification of the case decided before 1880, when the eighth edition of his work on Criminal Evidence was published. In that book, the cases bearing upon each of these widely conflicting views are referred to, either in the text or notes, as found in §§ 330-340, both inclusive, *et seq.* Since that time, he has contributed to the "Central Law Journal," published in St. Louis, Missouri, vol. 18, 402-405, a valuable

article upon the subject, sustaining the view set forth under the second head of this classification, upon the authority of numerous cases determined since the publication of his book. Among others he makes the following citations: *Graves v. State*, 16 Vroom, 203; *State v. West*, 1 Houst. Cr. Cas. (Del.); *Baccigalupo v. Commonwealth*, 33 Gratt. 807; s. c., 36 Am. Rep. 795; *Carter v. State*, 56 Ga. 463; *State v. Payne*, 86 N. C. 609; *Doswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 201; *State v. Redemier*, 71 Mo. 173; s. c., 36 Am. Rep. 462; *People v. Messersmith*, 61 Cal. 246; *Jones v. State*, 13 Tex. App.; *State v. Johnson*, 10 Tex. App. 571. The article in the "Central Law Journal," which merits for its learning, philosophic views and logical arrangement a careful study, reaches the conclusion that both in criminal and civil courts issues of insanity should be decided upon the same degree of proof. "In both courts," the author says, "the presumption is that persons coming into courts of justice are sane, and the burden of proof is on the parties contesting such sanity. In criminal courts, as well as in civil, the rule should be, that to take a particular person out of the category of reasonable and amenable beings, and to subject him to the sequestrations and restrictions imposed by the law on adjudicated lunatics, at least a preponderance of proof of insanity should be required."

In reviewing this charge which the judge of the Superior Court refuses to give, "That if the jury, after examining all the evidence in the case, are not satisfied beyond a reasonable doubt of the sanity of the prisoner at the time of the commission of the homicide, if their minds are wavering or doubtful upon this point, not at rest as to his sanity or insanity, the prisoner is entitled to the benefit of that doubt, and the jury are bound to acquit," but in lieu thereof charged, that if there was a preponderance of evidence in favor of insanity, they must acquit; this court, in *Curter's case*, *ut supra*, by WARNER, C. J., said: "Inasmuch as the law presumes, for the safety of society, that every person is of sound mind until the contrary appears, therefore that presumption should be rebutted by a preponderance of evidence of insanity at the time the offense is alleged to have been committed. Unless there is a preponderance of evidence in favor of the insanity of the defendant, the jury would not be authorized to acquit him of the offense with which he is charged, on that ground of his defense. The judge however did not, as we understand his charge, restrict the defendant in the case

Dapforth v. State.

before us from using this evidence, together with other circumstances in proof, to cast doubt upon his guilt, and in so doing he laid down quite as lenient a rule in his favor as he was entitled to have under the law. In *Long's case*, *ut sup.*, it was held that it was not error for the court, in a criminal case, to refuse to charge the jury, that if from any cause they have doubts of the prisoner's guilt, they must acquit, and to charge instead that any cause is too sweeping, but if they had any reasonable doubts, which arose from or grew out of the evidence, they must acquit. In other cases, where the defense made an *alibi*, we restricted the rule in a similar manner. *Landis' case*, 70 Ga. 651, and cases cited; *Ledford's case*, determined at the present term.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE V. NEW YORK, LAKE ERIE AND WESTERN RAILROAD
COMPANY.

(104 N. Y. 58.)

Railroads — duty to provide stations.

A railroad company is under no obligation to provide stations for passengers or warehouses for freight, unless expressly required by statute.

MANDAMUS. The opinion states the case. The plaintiff had judgment below.

E. C. Sprague, for appellant.

D. O'Brien, attorney-general, for respondent.

DANFORTH, J. Upon motion on notice by the attorney-general for a *mandamus* requiring the defendant to construct and maintain on the line of its road, at the village of Hamburg, a building of sufficient capacity to accommodate its passengers arriving at that place, or departing therefrom, or in waiting to depart, and such freight as is usually received at or shipped from that point, it appeared that the village of New Hamburg contains twelve hundred inhabitants and furnishes to the defendant at a station established by it, a large freight and passenger business; that its depot building

People v. New York, Lake Erie and Western Railroad Company.

is entirely inadequate for these purposes, and the absence of a depot building and warehouse sufficient for the accommodation of passengers and freight has been and continues to be a matter of serious damage to large numbers of persons doing business at that station. These facts were conceded by the defendant. It also appeared that upon complaint made to the railroad commissioners, after notice to the defendant, that body adjudged and recommended that the railroad company should construct a suitable building at the station within a time named, but although informed of this determination, the defendant failed to comply or do any thing toward complying with it, not for want of means or ability to do so, but because "its directors decided that the interests of the defendant required it to postpone, for the present, the erection or enlargement of the station house or depot at the village of Hamburg."

The Supreme Court at Special Term granted the motion, and adopting the language of the railroad commissioners, ordered that the defendant "forthwith construct and maintain a suitable depot building, of sufficient size and capacity to accommodate passengers arriving and departing on said road at the village of Hamburg, as well as such passengers as may be in waiting on ordinary occasions to depart from the said village, on the line and by the way of said defendant's road, and of sufficient capacity to accommodate such quantities of freight as are usually received at said village, or that may be shipped therefrom, by the way of said New York, Lake Erie and Western Railroad." Upon appeal to the General Term the order, after very careful consideration, was affirmed. The railroad company appeals.

We agree with the court below that at common law the defendant, as a carrier, is under no obligation to provide warehouses for freight offered, or depots for passengers waiting transportation. But that court has found such duty to be imposed by statute. To this we are unable to assent. The question arises upon the construction of the General Railroad Act (Laws of 1850, chap. 140), and its amendments. Under that act many companies have been formed to construct, maintain and operate railroads in a manner so affecting persons and private property as to be utterly indefensible, except upon the theory formulated by the express words of the statute, that the roads, when constructed, should be "for public use in the conveyance of persons and property." To promote that purpose and for that purpose only, such company may take

People v. New York, Lake Erie and Western Railroad Company.

the property of a citizen without his consent (§§ 1, 18), interfere with his travel and transportation by changing the lines of highways as may be desirable, with a view to the more easy ascent or descent of their own road (§ 24), and even appropriate to its purposes the land of a town or county or the State (§ 25). All these and other like powers are justified upon the ground, that when exercised, they are the acts of the government performed indirectly through the medium of a corporate body. It follows of course that the legislature has control over it and may compel the exercise of its functions and direct the management of its business and use of the road as in their judgment will best subserve the public interest.

The court below does not find, nor does the respondent claim, that the legislature has at any time, in express and specific terms, imposed upon a railroad company the duty of erecting or maintaining a depot or warehouse. It is sought to be implied. The company is empowered to erect and maintain all necessary and convenient buildings, stations, etc., "for the accommodation and use of their passengers, freight and business" (id., § 28, subd. 6), and may acquire and hold real estate and other property for these purposes, "as may be necessary to accomplish the object of its incorporation." There are some other provisions in the same direction; none go further than those cited. But from these, and from the circumstance first referred to, that the company is exercising a public trust, and to that cause owes its existence and capacity to enjoy and profit by the franchise it has accepted, it is argued by the respondent that the right to construct a station, and its necessity, carries with it an obligation to do so in a proper manner. In regard to the facts there is no dispute. A plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public.

The railroad commissioners have thought that it was essential for those purposes that a new and enlarged building for passengers and freight should be erected. That it is true is a question for them to decide. The statute (Laws of 1882, chap. 353), created a commission of "competent persons," required from them an official constitutional oath, assigned to them an office for the transaction of business, provided a clerk to administer oaths to witnesses and a marshal to summon them, gave full power of investigation and supervision of all railroads and their condition with reference not only to the security, but accommodation of the public, and de-

People v. New York, Lake Erie and Western Railroad Company.

clared that whenever in their judgment it shall appear, among other things, that any addition to, or change of the stations or station-houses is necessary to promote the security, convenience or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper, and if they are not made, they shall present the facts to the attorney-general for his consideration and action, and also to the legislature. All these things have been done. The commissioners have heard and decided. They can do no more. After so much preliminary action by a body wisely organized to exercise useful and beneficial functions, it might well be thought unfortunate that some additional machinery had not been provided to carry into effect their decision. By creating, the statute recognizes the necessity for, such a tribunal to adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial powers to hear and determine, upon notice, questions arising between these parties, but there it stops. Its proceedings and determinations, however characterized, amount to nothing more than an inquest for information. We find no law by which a court can carry into effect the decision. At this point the law fails, not only by its incompleteness and omission to furnish a remedy, but by its express provision that no request or advice of the board, "nor any investigation or report made by" it, shall have the effect to impair the legal rights of any railroad corporation. The attorney-general is given no new power. He may consider the result of the investigation made by the commissioners, and their decision, and so may the company, but we must look further for his right of action, and the corporation, disregarding the judgment of the commissioners, may continue the management of its business in its own way, may determine, in its own discretion, to what extent and in what manner the exercise of a public trust requires it to subserve the "security, convenience and accommodation of the public."

It may say, as in this case, the accommodations we furnish are not sufficient, they are not suitable, the omission to furnish different and better entails injury upon the public, but we will give no better, nor make alterations until we choose. The railroad commissioners, are powerless, and as the law now stands, neither the attorney-general of the State nor its courts can make their order effectual.

People v. New York, Lake Erie and Western Railroad Company.

Cases are cited by the respondent in support of a different contention. Some of them turn upon statutory provisions, as do those arising in Connecticut, where the law makes the order of the commissioners effectual by authorizing its enforcement. *State v. N. H. & N. R. Co.*, 37 Conn. 153. Under our statute the public gain nothing in any legal sense from the determination of the commissioners. It is not enforceable as a judgment; it is not even a command; if it affects the railroad company at all, it is as advice merely. It can compel them only through the interposition of the legislature, who may indeed make it effectual by action upon their report, or by some general law, if it be deemed expedient, giving force and efficacy to their determinations.

In the next place, as the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by *mandamus*. It cannot compel the erection of a station-house, nor the enlargement of one. The power of the company to provide such buildings is, under the statutes, a permissive one only. If the corporation choose to exercise it, it may. The statute does not exact it. It specifies certain things which the company shall not do. It specifies many things which it shall do, as among others, "start and run its cars for the transportation of passengers and property, at regular times, to be fixed by public notice, and furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and at the junctions of other railroads, and at usual stopping places established for receiving and discharging way passengers and freight for that train, and shall take, transport and discharge such passengers and property at and from and to such places on the due payment of fare or freight legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises," and it must do some other specified things for their accommodation. The statute is peremptory as to many matters, but it nowhere says that for its intending passengers, or waiting freights, cover by building of any kind shall be provided. As to that the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage

People v. New York, Lake Erie and Western Railroad Company.

"its affairs," among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by *mandamus* also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation. It was so in *People v. D. & C. R. Co.*, 58 N. Y. 152, where the defendant was compelled to restore an invaded highway to its former usefulness, a statutory duty (Laws of 1850, chap. 140, § 28, subd. 5); so in *People v. B. & A. R. Co.*, 70 N. Y. 569, to build a bridge as directed by statute (Laws of 1874, chap. 648); in *People v. R. & S. L. R. Co.*, 76 N. Y. 294, to erect fences as directed by statute (Laws of 1850, chap. 140). All these cases cited by the learned attorney-general, and there are many others, go upon the ground above stated.

Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by any fair or reasonable construction be implied. The whole subject of the relation between the company and its passengers and freightors appears to have been in contemplation of the legislature. Certain acts toward them as we have seen are made imperative as duties (§ 36); others, and among them the erection of stations and buildings, are made possible by permission (§ 28, subd. 8). We cannot disregard this difference in language, and give by implication to one phrase the same force and meaning which the legislature has by express terms conveyed in the other. We are constrained therefore to hold that the appeal must succeed.

The order appealed from should be reversed and the motion denied, with costs.

Ordered accordingly.

All concur, RAPALLO, J., in result.

VOL. LVIII — 62

FAIRBANKS V. SARGENT.

(104 N. Y. 108.)

Assignment—double, of chose in action—rights of assignees.

The *bona fide* purchaser of a chose in action, with authority to collect, takes it subject to the claim of one to whom the owner has previously assigned a part interest in it, for a valid consideration.

ACTION to recover bonds. The opinion states the case. The defendant had judgment below.

A. C. Brown, for appellant.

John Clinton Gray, for respondent.

RUGER, C. J. The principal question presented by this appeal when reduced to its simplest form, is whether a part owner of a chose in action, having authority to collect it, is entitled to retain the whole proceeds of such collection as a *bona fide* purchaser, if received by him in negotiable securities from the debtor.

Were it not that the courts below have answered affirmatively, we would have hardly supposed a contrary conclusion susceptible of reasonable doubt.

Other questions, incidentally involved, also appear from the facts, which as found by the court are substantially as follows: In January, 1869, Underwood owned a claim, resting in open account, against Zabriskie, arising out of stock transactions between them, upon which he claimed a balance due him exceeding \$100,000. Zabriskie disputed his liability thereon and Underwood, not being able to obtain payment, entered into a contract in writing with the plaintiff, an attorney residing in the city of New York, by which it was agreed between them, that the said Fairbanks, for his services in endeavoring to collect certain claims owned by Underwood, among which was that against Zabriskie, "is to have one-sixth of whatever amount of money, securities, or property shall be received on account of such claims as shall be settled without suit, and one-third of whatever amount of money, securities or property shall be collected, or in any way be realized or received (whether on settlement or without settlement), on account of such of said claims as shall be put in suit, either in this or any

Fairbanks v. Sargent.

other State or country," said Underwood "is to decide upon the terms and mode of settlement as to each and every of said claims, whether such settlement be before or after suit brought," also to determine whether or not suits should be brought, and if brought outside of the State, to determine who should be the attorney therein.

In January thereafter Fairbanks, by Underwood's direction, caused suit to be brought to recover the claim against Zabriskie in a court of competent jurisdiction in the State of New Jersey, that being the State where Zabriskie resided, and the action was steadily prosecuted by Fairbanks until it was settled as hereinafter stated.

In 1871 Underwood, being indebted to Henry W. Sargent, the defendant's testator, by an assignment in writing, absolute in form, transferred his claim against Zabriskie to Sargent as collateral security. On or about June 18, 1872, Underwood, at the urgent request of Sargent, and without the knowledge of the plaintiff, agreed to a settlement of the claim against Zabriskie by authorizing Sargent to accept from him forty bonds, being a part of a series of 200, for \$500 each, having nine coupons for the payment of half yearly installments of interest payable to bearer, attached to each, and purporting to be made by one Sarah R. Haight, as executrix of the estate of Richard K. Haight, her deceased husband. By these bonds Sarah R. Haight agreed, as executrix, at a specified time to pay the same and also to pay semi-annual interest thereon according to the terms of said coupons, and also represented thereby that she had secured such payments by a trust mortgage executed by her as executrix, upon certain real estate situated in the city of New York and represented to be property belonging to the estate of Richard K. Haight.

In pursuance of this agreement Underwood wrote and delivered to one Gray, the agent of Zabriskie, a written order addressed to the attorneys in New Jersey who had charge of the action against Zabriskie, stating that the action had been settled, and directing them to discontinue it upon payment by Zabriskie of their costs and charges and those of the referee. Underwood also, at or about the same time, executed and delivered a release of all claims against Zabriskie, to Gray to be delivered to Zabriskie, upon payment of the sum agreed upon for such settlement.

About June 14, Sargent, through his agent Monell, also delivered to Gray a duly executed release from Sargent to Underwood, of all claims and demands which Sargent had against Under-

wood, and also executed reassignments of the securities received by him from Underwood as collateral, with instructions to Gray to deliver them to Underwood after he should have received and forwarded to Sargent, the bonds received in settlement.

It also appears from the evidence that Zabriskie had notice of the assignment of the claim to Sargent, previous to the settlement, and authorized the delivery of the bonds to Sargent upon receiving a discharge from his liabilities to Underwood.

It must under the findings of the trial court also be assumed that neither Sargent nor Monell, at the time of such settlement, had any knowledge of the interest in the proceeds thereof, which was claimed by the plaintiff.

Under these circumstances, Fairbanks brings this action against Sargent to recover one-third of the bonds so received, or the value thereof, upon the ground that the agreement between him and Underwood constituted an equitable assignment of one-third of the property received on such settlement.

The first question in the case is as to the nature and extent of the right taken by Sargent in the Zabriskie claim by virtue of the assignment thereof to him by Underwood, and the rights growing out of the subsequent transactions between the parties.

Inasmuch as the Zabriskie claim was evidenced by no written acknowledgment from the debtor and was disputed by him, and was from its nature incapable of physical possession or manual delivery, no assignee from Underwood would acquire any superior right over any other assignee, by virtue of any possession or apparent ownership of the claim by his assignor. *Muller v. Pondir*, 55 N. Y. 332.

One assignee of such a claim from the owner must necessarily acquire the same interest in it that any other assignee does, and that is, in the absence of other controlling equities, an interest subject to the rule that he who is prior in point of time is prior in right. Such a claim is at common law non-assignable, and its assignee takes by virtue of an assignment thereof, an equitable interest only, which must be governed by equitable rules for its protection and enforcement. *Moore v. Met. Bk.*, 55 N. Y. 41; s. c., 14 Am. Rep. 173; *Ford v. White*, 16 Beav. 120; *Phillip v. Phillip*, 4 De G., F. & J. 208.

It is undoubtedly the general rule that the assignee of a chose in action takes it subject to all the equities existing against it in the

Fairbanks v. Sargent.

hands of his assignor, and can acquire no greater right or interest therein than belonged to his transferor.

It was said by Judge DENIO, in *Bush v. Lathrop*, 22 N. Y. 535, that the purchaser of a chose in action takes the interest purchased subject to all the defenses, legal and equitable, of the debtor who issued the security. * * * In the transmission of property of any kind from one person to another, the former owner can, in reason, only transfer what he himself has to part with, and the other can only take what is thus transferred to him. * * * It is unnecessary to refer to authorities for this general principle, or to point out the exceptions to it which have been created by the custom of merchants or by positive statutes. It is enough that the present case is not claimed to fall within any of those exceptions. But the rule, if limited in the manner I have stated it, does not aid the plaintiff; for it is not the equity of the debtor in these securities which is the question, but of the plaintiff's intestate against Preston, his immediate assignee; and the question is, whether the defendant is to be deemed to have purchased subject to this equity, or whether his assignment confers upon him a better title than his assignors, who were confessedly liable to it, had. The defendant claims that this is a latent equity, available only between the parties to it, and that it did not accompany the security when it passed into the hands of a subsequent owner." The learned judge quotes the rule laid down by Lord THURLOW, that "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

Bush v. Lathrop has been criticised in subsequent cases, and so far modified as to exclude from the operation of the principles there laid down the case of a purchase in good faith of a non-negotiable instrument from an assignee of the real owner, upon whom he has by assignment conferred the apparent absolute ownership, when such purchase has been made in reliance upon the title apparently acquired by such assignee.

This modification is placed upon the ground of estoppel and it is held that the real owner has, by the act of investing another with the apparent ownership of the property, estopped himself from disputing the title of one who thereafter acquires it in good faith from such assignee. *McNeil v. Tenth Nat. Bk.*, 46 N. Y. 325; s. c., 7 Am. Rep. 341; *Moore v. Met. Bk.*, 55 N. Y. 41; s. c., 14 Am. Rep. 173; *Armour v. Mich. C. R. Co.*, 65 N. Y. 111, 122; s. c., 22 Am. Rep. 603.

Konvalinka v. Schlegel.

We understand the rule stated in *Bush v. Lathrop*, with the exception mentioned, stands in full force unquestioned. *Ballard v. Burgett*, 40 N. Y. 314; *Weaver v. Barden*, 49 N. Y. 286; *Moore v. Met. Bk.*, *supra*.

Assuming therefore that Sargent could acquire from Underwood only such right as remained in him, after his agreement with plaintiff, it becomes material to inquire what rights, legal or equitable, were vested in Fairbanks by Underwood prior to the assignment to Sargent.

[Omitting this inquiry.]

We are therefore of the opinion that the plaintiff is entitled to a new trial.

The judgments of the courts below should be reversed and a new trial ordered with costs to abide the event.

Judgment reversed.

All concur, except DANFORTH, J., not voting.

 KONVALINKA V. SCHLEGEL.

(104 N. Y. 125.)

Will—dower—election.

A testator willed his residuary estate, consisting of both real and personal property, to his executors to sell it and divide the proceeds equally between his wife and children, share and share alike. *Held*, that the widow took dower in addition.*

SUIT for construction of will. The opinion states the case.

John W. Konvalinka and *Henry McCloskey*, for appellants.

E. Glover and *George Bliss*, for respondents.

ANDREWS, J. The question is, whether the widow of the testator is put to her election between dower and the provision in the will.

The estate of the testator consisted of both real and personal property. The will, after directing the payment of the testator's debts and funeral expenses, and after giving to his wife the bedroom furniture in his dwelling-house, and to his children the rest

* See *Estate of Gotsian* (34 Minn. 159), 57 Am. Rep. 48.

Konvalinka v. Schlegel.

of the furniture therein, proceeds as follows: "All the rest, residue and remainder of my estate, property and effects of every nature, kind and description, I give, devise and bequeath to my executors and executrix hereinafter named, and I authorize and direct them to sell and dispose of the same at such time and on such terms as to them shall seem best and to divide the proceeds thereof equally among my wife and children, share and share alike."

There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife, except by express words or by necessary implication. Where there are no express words, there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is a devisee under the will for life or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust to a family arrangement, or even because it may be inferred or believed, in view of all circumstances, that if the attention of the testator had been drawn to the subject he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration, which in the absence of express words will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and claim to the benefit given by the will. We cite a few of the cases in this State showing the general principle and the wide range of application. *Adsi v. Adsit*, 2 Johns. Ch. 449; s. c., 7 Am. Dec. 539; *Sanford v. Jackson*, 10 Paige, 266; *Church v. Bull*, 2 Den. 430; s. c., 43 Am. Dec. 754; *Lewis v. Smith*, 9 N. Y. 502; *Fuller v. Yates*, 8 Paige, 325; *Havens v. Havens*, 1 Sandf. Ch. 324, 331; *Wood v. Wood*, 5 Paige, 596; s. c., 28 Am. Dec. 451.

In view of these settled rules, we think the widow in this case was not put to her election. The devise to the executors was void as a trust, but valid as a power in trust, for the sale of the lands and a division of the proceeds and the lands descended to the heirs

of the testator, subject to the execution of the power. 1 Rev. Stat. 729, § 56; *Cook v. Platt*, 98 N. Y. 35. It is strenuously urged that the power of sale being peremptory, worked an equitable conversion of the lands into personalty, as of the time of the testator's death, and created a trust in the executors in the proceeds for the purpose of distribution, which trust, it is alleged, is inconsistent with the claim of dower. The doctrine of equitable conversion, as the phrase implies, is a fiction of equity which is frequently applied to solve questions as to the validity of trusts; to determine the legal character of the interests of beneficiaries; the devolution of property as between real and personal representatives, and for other purposes. It seems to be supposed that there is a necessary repugnancy between the existence of a trust and real property created by a will, and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. If the purposes of a trust, as declared, require that the entire title, free from the dower interest of the widow, should be vested in the trustees in order to effectuate the purposes of the testator in creating it, a clear case for an election is presented. *Vernon v. Vernon*, 53 N. Y. 351. But the mere creation of a trust for the sale of real property and its distribution is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person, paramount to that of the trustee. In the cases of *Savage v. Burnham*, 17 N. Y. 561, and *Tobias v. Ketcham*, 32 N. Y. 319, the widow was put to her election, not because the vesting of the title in trustees was *per se* inconsistent with a claim for dower, but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon. There is language in the latter case, which disconnected with the context may give color to the contention of the appellant. But it is the principle upon which adjudged cases proceed, which is mainly to be looked to, because a correct principle is sometimes misapplied. There is however no ground for misapprehension of the meaning of the learned judge in that case, interpreting his language with reference to facts then under consideration. It has frequently been declared that powers of, or in trust for sale, are not inconsistent with the widow's right of dower. *Gibson v. Gibson*,

Konvalinka v. Schlegel.

17 Eng. L. and Eq. 349; *Bending v. Bending*, 3 Kay & J. 257; *Adsil v. Adsit*, *supra*; *In re Frazer*, 92 N. Y. 239. And it was held in *Wood v. Wood*, 5 Paige, 596; s. c., 28 Am. Dec. 457, that the widow was not to her election where the testator devised all his property to trustees with a peremptory power of sale, and directed the payment to the widow of an annuity out of the converted fund. The same conclusion was reached under very similar circumstances in *Fuller v. Yates*, 8 Paige, 325, and *In re Frazer*, *supra*, the widow's dower was held not to be excluded by a provision in the will, although as to a portion of the realty the power of sale given to the executors was peremptory. The general doctrine is very clearly stated by the vice-chancellor in *Ellis v. Lewis*, 3 Hare, 310: "I take the law to be clearly settled at this day, that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not *per se* express an intention to devise the lands otherwise than subject to its legal incidents, dower included." This remark of the vice-chancellor also answers the claim that the testator, when he described as the subject of the dower, "all the rest, residue and remainder of my estate," meant the entire title, or the estate as enjoyed by him. A similar argument was answered by Lord THURLOW in *Foster v. Cook*, 3 Bro. Ch. C. 347. "Because," he said, "testator gives all his property to the trustees, I am to gather from his having given all he has, that he has given that which he has not." The argument that the testator intended equality of division between his wife and children is also answered by the same consideration. The proceeds of the testator's estate were, by the will, to be equally distributed. It left untouched the dower of the widow, which he could not sell or authorize to be sold, and which was a legal right not derived from him and paramount to all others. It may be conjectured, perhaps reasonably inferred, that the testator really intended the provision for his wife to be exclusive of any other interest, but so it is not written in the will, and we are not permitted to yield any force to the suggestion. It is a question of legal interpretation which has been settled.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

ROBERT V. SADLER.

(104 N. Y. 229.)

Highway — removing gravel in repairing.

In the construction of a highway, the public authorities may not authorize the removal of soil from below grade on the land of one owner and using it in the construction of the highway over the lands of others. (*See note, p. 500.*)

ACTION to restrain carrying away soil. The opinion states the case. The defendant had judgment below.

J. D. Pray and H. B. Hubbard, for appellant.

William Sullivan, for respondents.

FINCH, J. The constitutional question in this case has been decided against the appellant in *Hubbard* against the same defendants, which respected the laying out and opening of the same street or avenue involved in this appeal.

But a further question not in that case is raised in this. The findings of fact establish that the grade of the avenue was fixed and a contract for its construction made with one Curran. By the terms of that contract he was required to cover the roadway to a depth of fifteen inches with gravel, hard-pan or other materials approved by the commissioners. The land within the road lines crossing plaintiffs' premises was higher than the grade fixed and required a removal of the earth to the depth of such grade and possibly fifteen inches below it. The contractor not only removed this material above grade and used it upon the avenue for the purpose of filling and construction, but he dug pits in the roadway to a depth of six feet below the grade in order to get gravel with which to perform his contract without paying for it, and it is found that these pits thus made are "intended and required" to be filled up again with earth before the avenue is completed. The complaint alleges that the pits were dug on "the sidewalk" of said avenue, and the answer admits that "the gravel pits of which the plaintiffs complain have been dug for the purpose of obtaining gravel to be used on the roadway." It is conceded that the public took only an easement for a street or avenue over the plaintiffs' premises, and that they retained the fee in that part of the land on which the

Robert v. Sadler.

pits were dug. The justification which has succeeded goes upon the ground that the acts complained of were embraced in the easement and authorized by it. The question involved was properly raised by exceptions. The courts have held that where, to reach and prepare the surface of the road in accordance with its grade line, superincumbent material is necessarily removed, it may be used upon other parts of the road and on the premises of other land owners, and that where there has been no negligence in construction consequential injuries necessarily resulting cannot be recovered. It was said in *Pumpelly v. Green Bay Company*, 13 Wall. 166, 181, that this class of decisions "have gone to the uttermost limit of sound judicial construction" and "in some cases beyond it." The observation was just. To take merely an easement in land leaving the fee in the owner, and then by advancing stages of judicial endurance, sap the value and utility of the fee by adding its benefits to the easement is scarcely consistent with a policy which is at the same time sedulously protecting the rights of abutters, having no fee in the street whatever, to their easements of light and air and access. It is perfectly well settled that in a case like the present the public acquire only a right of way with the powers and privileges incident to that right (*Jackson v. Hathaway*, 15 Johns. 447, 452), and that the owner of the fee retains his exclusive right in all mines, quarries, springs of water, timber and earth for all purposes not incompatible with the right of way. The question in every case turns upon what is "incident" to the construction or maintenance of the right of way. In *Higgins v. Reynolds*, 31 N. Y. 156, stone was taken from the limits of a highway and its value recovered. In *Niagara Falls Suspension Bridge Co. v. Bachman*, 4 Lans. 524, it was said that gravel might be removed to other parts of the road, but it is quite apparent that this was gravel necessary to be removed in order to get the highway to its grade. In *Fisher v. City of Rochester*, 6 Lans. 225, the work done was the construction of a sewer and the contractor used stones excavated from within the street limits. It was held that they belonged to the land owner. In *Kenney v. Williams*, 14 Barb. 629, the owner of the fee took away sand from within the limits of the highway but without injury to the public right of travel, and his action was sustained. In *Denniston v. Clark*, 125 Mass. 216, the gravel removed was a bank above the grade necessary to be cut through and such as afterward from natural causes fell down from the side slopes and filled the ditches which it became

;

Robert v. Sadler.

necessary again to open. These are the cases cited by the General Term. None of them sustain the conclusion reached. Those which are not adverse justify only the taking of earth or soil which the process of construction or repair requires and necessarily compels to be removed. I have found no case in this State which goes further, and am unwilling to pass beyond those limits. Here the pits were dug to be filled again. Concededly the process was to take from the land owner valuable material and substitute a poorer quality. Digging the pits was not only no incident necessarily or naturally growing out of construction but a deliberate destruction of the grade when reached, and which did not need to be disturbed, but on the contrary, compelled replacement and repair of the mischief done. Of the two cases cited from other States one goes no further than we here concede to be just. *City of New Haven v. Sargent*, 38 Conn. 50; s. c., 9 Am. Rep. 360. The court is careful to speak of the soil taken as that "which must necessarily be removed by some one in grading the street." The other, *Bissell v. Collins*, 28 Mich. 277; s. c., 15 Am. Rep. 217, seems to go further because the "major portion of the gravel was taken from below the grade of the street." The report of the case furnishes no details, and it may be that the gravel removed was loosened and made superfluous at the point of removal in the ordinary process of grading. If it goes further we do not think its doctrine should be followed.

The cases which hold that the fee in a highway devoted to the perpetual easement of the public use is of only nominal value, need not be considered. If such value is in any case a question of law which the court may determine, the smallness of the value does not justify a seizure of the fee without due and lawful authority or its destruction by indirect rulings. No invasion of the property rights of the citizen can safely be deemed trifling.

The judgment and order appealed from should be reversed and a new trial granted, costs to abide the event.

Judgment reversed.

All concur except RUGER, C. J., and EARL, J., not voting.

NOTE BY THE REPORTER.—In *Town of Palatine v. Krueger*, Supreme Court of Illinois, May 12, 1887, it was held that the owner of the fee of a street in an incorporated town in Illinois has no right to remove, or authorize the removal of gravel or dirt from the bed of such street, contrary to an ordinance of the town trustees, who by the act incorporating the town, are empowered to keep

Robert v. Sadler.

all the streets and alleys in such town in repair, and make such ordinances in relation thereto as may be necessary and expedient. The court said: "Where a highway is located over lands outside of an incorporated town, the public acquire only an easement of passage, with the rights incident thereto; while the owner of the land over which the road is laid retains the fee, and the ownership of every thing connected with the soil, for all purposes not incompatible with the public right of way. *Town of Old Town v. Dooley*, 81 Ill. 255, Dill. Mun. Corp., § 544. In the location of highways in the county, the public require nothing more than an easement, with the rights incident, under which may be included the right to tile drain beneath the soil, and the right to use the soil or other material on the line of the road for construction and repairs. But the uses to which streets may be put in incorporated towns, where the fee of the street may remain in the owner of the adjoining land, are far more numerous. It may be necessary to change the grade. Culverts, drains and sewers, may be required. Gas-pipes and water-pipes may be needed; and the authorities of the incorporated town or city may lay them, or authorize them to be laid, under the street. Lamp-posts may be erected on the streets, and various other improvements which the public wants may require; and, while the owner of the land adjoining the street may own the fee in the street, he has no right to do any act which will interfere with the rights of the public to the use of the street, for all purposes for which they may be needed by the public.

"In *People v. Kerr*, 27 N. Y. 188, in discussing the rights of the land-owner and the public in reference to streets in a city, it is said: 'It has always been supposed and stated that there must be a difference between the needs, and therefore the rights, of the public in a country road and a city street, and in the character of the servitudes imposed upon the land by the two uses respectively.'

"In *City of Cincinnati v. White*, 6 Pet. 482, the court say: 'Dedications must be considered in reference to the use for which they are made; and in a town or city streets require a more enlarged right over the ground, to carry into effect the purposes intended, than may be necessary for highways in the country.'

"*New Haven v. Sargent*, 38 Conn. 50; s. c., 9 Am. Rep. 360, is a case directly in point. The question arose in a petition for an injunction to restrain Sargent, who owned the fee on the street, from removing surplus earth which the city desired to use in grading an adjoining street. In deciding the case the court said: 'It is apparent that the real question in this case is whether * * * the city has a legal and exclusive right, as against the respondent (owner of the fee) to carry the soil from in front of his land, and deposit it in a depression in Derby avenue (an adjoining street). The court conclude: 'We think therefore that the power and right of the city to remove the soil in question to Martin street or Derby avenue, where it is reasonably required, are undoubted; that the right is paramount to the right of the respondent; that presumptively he was paid for the soil which has been or is to be taken, and has no just cause for complaint; and that in attempting to remove the soil on to his own premises, and deprive the city of it, after being apprised of their imme-

Matter of McPherson.

diat necessities and intentions, and to the injury of the city, he was a wrongdoer, and should be restrained by injunction.' See also *Milbau v. Sharp*, 15 Barb. 210; *West v. Bancroft*, 32 Vt. 367; Dill. Mun. Corp. 544; Ang. Highways, 312, where the same doctrine is announced.

"We have been referred by appellee to *Smith v. Rome*, 19 Ga. 89, as an authority sustaining his view. The case seems to be in point, but we do not regard it in harmony with the current of authority on the subject, and we are not inclined to follow it. This case is referred to in Dill. Mun. Corp. 526, in the note, and the author thinks the case erroneously decided, and cites *Hovey v. Mayo*, 43 Me. 322, a later case, where a contrary doctrine is announced. Other authorities have been cited by appellee. In the main they have referred to highways laid out in the country, and it will serve no useful purpose to examine the cases in detail. We are free to concede that older authorities are more favorable to appellee's position than the recent decisions. This is well expressed by Angell on Highways, § 312, in the following language: 'The more ancient decisions limited the right of the public to that of passage and repassage, and treated any interference of the soil other than was necessary to the enjoyment of this right as a trespass. But the modern decisions have very much extended the public right, and particularly on the streets of populous cities have reduced the interest of the owner of the soil to a mere naked fee of only a nominal value.' The incorporated authorities, under their charter, were required to keep the streets in a reasonably safe condition to accommodate the demands of the public. This duty could not be discharged, if property owners adjoining on the streets have the right, at their will and pleasure, to go upon the streets, and remove gravel and earth. The ordinance was passed for the purpose of protecting the streets, it is reasonable in terms, and one which may, with propriety, be enforced in any incorporated town or city."

MATTER OF MCPHERSON.

(104 N. Y. 306.)

Constitutional law — tax on inheritances.

A tax on gifts, legacies and collateral inheritances is constitutional.

APPEAL from surrogate's decree. The opinion states the case.

John F. Montignani and Robert G. Sherer, for appellant.

Leonard G. Hun, Eugene Burlingame, Alexander G. McDonald, James E. Kelly, Robert Sewell, E. L. Fancher, John E. Parsons, Charles A. Davison, S. Brownell, Horace Russell, Hugh Reilly and Mark Cohn, for respondents.

Matter of McPherson.

EARL, J. Mary McPherson died in the city of Albany on the 6th day of February, 1886, leaving a will which was admitted to probate by the surrogate of Albany county. In her will she bequeathed legacies to various persons who were in no way related to her, and upon the petition of the district attorney of that county the surrogate ordered the executors named in the will to pay the succession tax imposed by chapter 483 of the Laws of 1885. The executors and several of the legatees appealed from the decision of the surrogate to the General Term and from affirmance there to this court. The claim on the part of the appellants is that the act of 1885 is, for various reasons, unconstitutional and void, that the tax was not therefore legally imposed, and that its collection and payment cannot be rightfully enforced.

The first section of the act provides that "after the passage of the act all property which shall pass by will, or by the intestate laws of this State from any person who may die seised or possessed of the same while being a resident of the State, or which property shall be within this State, or any part of such property, or any interest therein, or income therefrom, transferred by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to a body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or the income thereof, other than to or for the use of the father, mother, husband, wife, children, brother and sister, lineal descendants born in lawful wedlock, and the wife or widow of a son and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation, shall be and is subject to a tax of \$5 on every \$100 of the clear market value of such property, and at and after the same rate for any less amount, to be paid to the treasurer of the proper county and in the city and county of New York to the comptroller thereof for the use of the State, and all administrators, executors and trustees shall be liable for any and all taxes until the same shall be paid as hereinafter directed."

We entertain no doubt that such a tax can be constitutionally imposed. The power of the legislature over the subject of taxation, except as limited by constitutional restriction, is unbounded. It is for that body, in the exercise of its discretion, to select the objects of taxation. It may impose all the taxes upon lands, or all upon

Matter of McPherson.

personal property, or all upon houses or upon incomes. It may raise revenue by capitation taxes, by special taxes upon carriages, horses, servants, dogs, franchises and upon every species of property and upon all kinds of business and trades. *People v. Mayor of Brooklyn*, 4 N. Y. 419; s. c., 55 Am. Dec. 266; *Stuart v. Palmer*, 74 N. Y. 183; s. c., 30 Am. Rep. 289; *People v. Equitable Trust Co.*, 96 N. Y. 387; *Portland Bk. v. Apthorp*, 12 Mass. 252; Cooley Tax. 7. Taxes upon legacies and inheritances have been approved generally by writers upon political economy and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society. Such taxes were imposed in Rome two thousand years ago, and are now imposed in England and several of the continental countries of Europe, and in the States of Pennsylvania, Maryland and Virginia, and perhaps other States of this country. *Williams' case*, 3 Bland Ch. 186, 259; *Eyre v. Jacobs*, 14 Gratt. 422; s. c., 73 Am. Dec. 367, and in 1864 (13 U. S. Stats. at Large, 287) a tax was imposed by the Federal government upon successions to real estate. The acts imposing such taxes have frequently come before the courts and have uniformly been upheld. *Carpenter v. Comm.*, 17 How. 456; *Scholey v. Rew*, 23 Wall. 331; *Clapp v. Sampson*, 94 U. S. 589; *Wright v. Blakeslee*, 101 U. S. 174; *Mason v. Sargent*, 104 U. S. 689; *In re Short's Estate*, 16 Penn. St. 63; *Slinger v. Comm.*, 26 Penn. St. 422; *Comm. v. Freedley*, 21 Penn. St. 33; *Strode v. Comm.*, 52 Penn. St. 181; *Miller v. Comm.*, 27 Gratt. 110; *Tyson v. State*, 8 Md. 578; *State v. Dorsey*, 6 Gill, 388; *Williams' case*, Bland Ch. 186. The case of the *State v. Dorsey* was a curious one, possible only under a state of society long since passed in this country. There the bequest of freedom to a slave was held to be a legacy within the meaning and operation of the Maryland act imposing taxes upon legacies, and the executor was compelled to pay it.

It is not very important to determine in this case whether the act of 1885 is to be regarded as imposing a tax upon property or upon the succession or devolution of property by will or intestacy. In either case it is a special tax. In the one case it is a tax upon the particular class of property, and in the other case a tax upon the succession or devolution of property, or the right to receive property in the cases mentioned in the statute. Whether it be one or the other it is free from constitutional objection. It has never

Matter of McPherson.

been questioned that the legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers. Taxes of a similar character were quite extensively imposed by the acts of Congress passed during the late civil war. If this be regarded as a tax upon property, then it is free from constitutional objection if it be equally imposed and properly apportioned upon all the property of the class to which it belongs. A tax imposed for the general welfare upon a particular house, or the houses of a particular neighborhood, would be amenable to constitutional objection, but if imposed upon all the houses in the State, then it is a tax imposed upon all the property of that class, and is amenable to no objection.

It is also objected that this tax is not constitutionally imposed because there is no compliance in the act with section 20 of article 3 of the Constitution of this State, which provides that "every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." Section 1 of this act requires that this tax shall be paid "for the use of the State," and this is the only designation of the object to which the tax is to be applied. If we were obliged to hold that this constitutional provision is applicable to this case, we should have difficulty to determine that the object of the tax is sufficiently stated. It has been held that the object is sufficiently stated if the act imposing a tax provides that it shall be paid to the credit of the general fund. *People v. Sup'rs of Orange Co.*, 17 N. Y. 239; *People v. Home Ins. Co.*, 92 N. Y. 335. The decision which first announced this doctrine greatly impaired the value of the constitutional provision, because when the tax has once been paid into the general fund it may be appropriated by the legislature to any of the innumerable objects, ordinary and extraordinary, for which the State may need money; and thus any information given to members of the legislature, or to tax-payers, by such a statement of the object of the tax is more illusory than real. But it must be assumed that the constitutional provision still has some value, and it should not be entirely nullified by judicial construction, as it would be if we should hold that this act sufficiently states the object of the tax within the meaning of the Constitution. But we are of the opinion that this section of the Constitution is not applicable to this case. In terms it applies to every tax which the

legislature can impose, and is not confined to a property tax. It is not even by its terms confined to a general tax embracing the whole State ; but the language, literally construed, is broad enough to embrace every local tax imposed for local purposes. As stated above, taxes may be imposed upon a great variety of objects. They may be direct or indirect, special or general, and they may be imposed in the shape of excise and licenses, upon hawkers, peddlers, auctioneers, insurance agents, liquor dealers and others. All the contributions for the support of the government, enforced from individuals in the various ways mentioned, are, properly speaking, taxes. Notwithstanding the general language of the section referred to, we do not think it was intended to apply to every tax which the legislature could impose, and so it has been held.

The object of the constitutional provision was to convey information to the members of the legislature and to the people, and it should have a practical construction, with a view to accomplish its purpose so far as attainable, and to carry out the policy which we may assume dictated it.

The tax imposed by this act is a permanent one. It is always uncertain upon whom it will fall and how much revenue it will produce. It would have been impossible for the legislature, perhaps years in advance, to specify the particular objects to which the tax should be applied, and we are of opinion that this section of the Constitution was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution and imposed generally upon the entire property of the State. The legislature would know definitely the objects for which such taxes were imposed, and could anticipate, with some certainty, the amount which they would produce ; and in their imposition it was deemed important by the framers of the Constitution that the object of the tax should be stated. But we do not think that the policy embodied in the section had any reference to special taxes which may be collected in a variety of ways under general laws, such as auction duties, excise duties, taxes on business or particular trades, avocations or special classes of property. It has been held in several States where constitutional provisions required that property taxes should be equal and uniform, that such provisions had reference only to general, annually recurring taxes upon property generally, and not to special taxes upon privileges or special or limited kinds of property. It was said in *Sun Mutual Insurance Company v. City*

Matter of McPherson.

of *New York*, 2 Sandf. 10, by OAKLEY, C. J., in speaking of this constitutional provision, that it might be "seriously doubted whether it ought not to be construed as relating exclusively to the imposition of a general tax for State purposes, and not at all to the imposition of a local tax for local objects." In *People v. Moring*, 3 Abb. Dec. 539, the court had under consideration the acts of 1846 and 1866, imposing duties upon auctioneers and brokers, and the acts were challenged as in contravention of this section of the Constitution, and HUNT, J., writing the opinion of the court, expressed concurrence with the intimation of Judge OAKLEY in the case last cited, and said that this section "was not intended to be applied to laws which impose duties, fees or excises on particular professions, classes of trades or individuals, but that the same relates only to a general tax upon the property of the State;" that "this section, I have no doubt, contemplates a general tax upon all the property of the State and was not intended to be satisfied with, or to apply to a local tax upon a particular section, or to a tax imposing fees or duties upon trades or individuals, although the same are direct taxes equally as if imposed upon the entire property of the State." It was said by FINCH, J., in *People v. Fire Association of Philadelphia*, 92 N. Y. 311; s. c., 44 Am. Rep. 380, that the tax covered by the constitutional provision is one general in its provisions and co-extensive with the State.

It is thus seen that there are cases where the language of this section of the Constitution must be restricted by construction, and we think this is one of them.

[Minor matters omitted.]

We are therefore of the opinion that there is no constitutional objection to this act which affects this case, and that the judgment should be affirmed, with costs.

Judgment affirmed.

All concur except RAPALLO, J., not voting.

KUNZ V. CITY OF TROY.

(104 N. Y. 344.)

Municipal corporation — negligence — defect in street — infant playing — parent's negligence

A. placed a large heavy counter on the sidewalk of a frequented street in a busy part of a city, in such a manner as to be easily thrown down. Four days afterward the counter was thrown down by children running against or jumping upon it in play, and fell upon G., one of those children, aged five or six years, inflicting fatal injuries. There was evidence that G.'s father went into a store near by, leaving G. at the door, cautioning him not to go far away; the father returned in from two to five minutes, during which time the accident happened. By a city ordinance the placing of the counter on the sidewalk was unlawful, and the city officials were authorized to remove it. *Held*, that the court erred in nonsuiting the administrator of the deceased in an action against the city for his death.*

ACTION for causing death of plaintiff's intestate. The opinion states the case. The defendant had judgment below.

E. S. Fursman, for appellant.

R. A. Parmenter, for respondent.

ANDREWS, J. We think the case should have been submitted to the jury. The duty to keep the streets in the city of Troy in repair and free from obstructions is a corporate duty resting upon the municipality, springing from the acceptance by the city of its charter and the power of the municipal legislative body to protect streets against nuisances, to the injury of the public right or of individuals lawfully using them.

[Minor matter omitted.]

The negligence, if any, on the part of the city in the present case, does not arise from any affirmative act, but from an alleged omission to exercise proper care and supervision, and permitting the counter, unlawfully placed on the sidewalk by McLaughlin, to remain there after notice of the obstruction. The death of the plaintiff's intestate, caused by the falling of the counter, demonstrates that it was a dangerous obstruction on the sidewalk. It is quite probable that it would not have fallen without the agency and con-

* See *Hussey v. Ryan* (64 Md. 426), 54 Am. Rep. 772.

Kunz v. City of Troy.

tact of the children who were playing about it. But such an interference might reasonably have been anticipated, and to place a large object, as the counter was, on a sidewalk on a frequented street, tilted in such a manner that it could be thrown down by two or three children of five or six years of age running against or climbing upon it, was plainly an unlawful and negligent act.

The city however was not responsible for the original wrong. Its culpability, if any, as we have said, consists in not interfering to cause the removal of the obstruction after due notice of its existence. It is not claimed that there was any actual notice of the obstruction to the mayor, or the legislative body, or any city official, unless notice to patrolmen was notice to the city. It is denied that notice to members of the police force was notice to the city, for the reason before indicated. But aside from the fact that the obstruction was observed by patrolmen, the counter was placed on the sidewalk on Tuesday, and remained there until Saturday, the day of the accident, and it is not claimed that meanwhile any measures were taken by the authorities to have the obstruction removed. This lapse of time, together with the fact that Federal street was in a busy and frequented part of the city, made it, we think, under the authorities, a question for the jury, whether the city authorities, charged with the care of the public streets, ought to have known of the obstruction and to have caused its removal before the accident. If the city authorities had no actual notice, nevertheless, if their ignorance was owing to an omission of the duty of inspection, and of the degree of diligence which might reasonably be expected under all the circumstances, the opportunity of knowledge stands, for the purposes of the case, as actual knowledge, and the city is equally chargeable as if express notice had been actually proven. *Weed v. Village of Ballston Spa*, 76 N. Y. 329, and cases cited. It is obvious that this rule, unless carefully administered by courts and juries, may impose unjustifiable burdens upon municipal corporations. The rule requiring care on the part of municipalities in protecting and keeping safe the public streets, and which subjects such corporations to the consequences of a disregard of their statutory duties in this respect, is wholesome, and founded, we think, in just principles. The danger is that courts and juries may not sufficiently take into account, in determining the question of negligence, the extent of roadways in the city, under the supervision of the city authorities, the unavoidable delay often

attending the action of municipal authorities, and financial and other embarrassments. Where the question of negligence, in not removing an obstruction unlawfully placed in the street by third persons, depends upon implied notice, what is a reasonable time from which notice is to be inferred must be determined upon all the circumstances, giving weight to the consideration that municipal authorities with their multiplied duties cannot be expected to act with the promptness and celerity of individuals in conducting their private affairs.

The remaining question relates to the alleged negligence of the plaintiff's intestate. The intestate was a child between five and six years of age. We understand the rule to be that in an action for an injury founded on negligence, contributory personal negligence cannot be attributed to a child of very tender years, who from his age cannot be supposed capable of exercising judgment or discretion, although the injury would not have happened without his concurring act, and although that act if committed by an adult would be a negligent one. In such a case a defendant whose negligence was a constituent element of the transaction, and without which the injury would not have happened, is legally responsible, notwithstanding the negligence of the infant, unless it appears that the parents or guardians were negligent in permitting the child to be brought into the situation which subjected it to the hazard and resulting injury. There is an obligation in general upon all persons to conduct themselves with prudence and care, and not recklessly, or even incautiously expose themselves to danger, even from the negligent acts of others. But the law exacts no impossibility. It does not require an infant before reaching the age of discretion to exercise discretion. But it imposes upon parents and guardians the duty of using reasonable care to protect those incapable of protecting themselves, and if they fail to exercise such care, and the infant is thereby brought into danger and suffers injury from the negligent act of another, their negligence is deemed the negligence of the infant. In *Hartfield v. Roper*, 21 Wend. 615, it was held as matter of fact that there was no negligence on the part of the defendant, and that that there was negligence on the part of the parents in permitting a child two and a half years of age to be in the roadway. The new trial in that case was properly granted on either ground. There are some remarks in the opinion, which disconnected with the context, may be construed as sustain-

Kunz v. City of Troy.

ing the proposition, that although there was no negligence on the part of the parents, the plaintiff could not maintain the action if the conduct of the child contributed to the injury. But we understand the present doctrine on this question to be that it is not sufficient to defeat a recovery for an injury to a child, not *sui juris*, caused by the negligence of a defendant, that the act of the child was one which in an adult would be deemed a negligent one contributing to the injury. There must also be concurring negligence on the part of the parents or guardians. *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; s. c., 7 Am. Rep. 450; *McGury v. Loomis*, 63 N. Y. 104; s. c., 20 Am. Rep. 510. In the absence of negligence on the part of the parents or guardian, the doctrine of contributory negligence has in such a case no application.

In this case the child playing about the counter was indulging a natural instinct in amusing himself and was not guilty of legal negligence, "although he contributed to the mischief by his own act." Lord DENMAN in *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 20. The law does not define when a child becomes *sui juris*. If there was any question whether the plaintiff's intestate had sufficient discretion to understand the danger of the situation, it should have been left to the jury, with proper instructions as to the degree of care exacted of a child of tender years, under the circumstances. *Mannum v. Brooklyn R. Co.*, 38 N. Y. 455; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 418; *Byrne v. Same*, 83 N. Y. 620; *Dowling v. Same*, 90 N. Y. 670; *R. Co. v. Stout*, 17 Wall. 657. It is insisted however that the father of the intestate was chargeable with negligence in permitting the child to be on the sidewalk unattended. It has been held that it is not *per se* wrongful or negligent to permit children to play in the street. *McGury v. Loomis*, *supra*; *McGuire v. Spence*, 91 N. Y. 303. It may or may not be negligence, depending upon circumstances. It was we think for the jury to determine whether the father of the intestate was guilty of negligence. The plaintiff is entitled to the most favorable inferences deducible from the evidence, and in reviewing the nonsuit all contested questions of fact are to be deemed established in his favor. The jury would have been entitled to have found from the evidence that the father left the child at the door of the store to go into the store to make change, cautioning the boy not to go far away, and on his return, from two to five minutes later, the accident had happened. It would be, we think, too strict a rule to impute negligence to the

Byrne v. New York Central and Hudson River Railroad Company.

father as matter of law under such circumstances. See *Cosgrove v. Ogden*, 49 N. Y. 255; s. c., 10 Am. Rep. 361.

We think the court erred in directing a nonsuit, and that the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

BYRNE V. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

(104 N. Y. 362.)

Railroad — duty toward licensees at crossings.

When a railroad company has long, constantly and notoriously permitted the public to cross its track at a place not in a highway, it is bound to use reasonable care toward persons so crossing, and to give notice and warning to them, and what constitutes reasonable care is a question of fact.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Esek Cowen, for appellant.

R. A. Parmenter, for respondent.

EARL, J. There was some controversy upon the trial of this action as to whether or not the place where the plaintiff was injured was a travelled public highway, and the trial judge submitted the case to the jury upon the assumption that it was not. There was however evidence tending to show that there was an alley, at the place where the plaintiff was injured, which was extensively and notoriously used by the public, without any objection on the part of the defendant, or any question as to the right of all persons so to use it; and the judge charged the jury that it was a question for them to determine to what extent and in what manner the alley was used by the public; that if they came to the conclusion that the right of passage was there exercised by the public, as claimed by the plaintiff, notoriously and constantly, previous to and at the time of the accident, then they were required to determine the amount of care and prudence which the defendant was required to exercise in approaching and crossing the alley, and that then the defendant, while not absolutely bound to ring a bell

Byrne v. New York Central and Hudson River Railroad Company.

or blow a whistle, yet was bound to give some notice and warning, reasonable and proper under the circumstances, in approaching the crossing; and that it was for them to determine whether such notice and warning was given. The law, as thus laid down, was fully warranted by the case of *Barry v. N. Y. Cent. and H. R. R. Co.*, 92 N. Y. 289; s. c., 44 Am. Rep. 377. In that case it was held that where the public, for a series of years, had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to all persons to cross at that point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains so as to protect them from injury. We think that case, notwithstanding the criticism of the learned counsel for the defendant in this case, is in entire harmony with the previous cases of *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525, and *Sutton v. N. Y. Cent. and H. R. R. Co.*, 66 N. Y. 243. In the three cases, the distinction between active negligence causing an injury, and mere passive negligence, was clearly pointed out. In the *Barry* case, the railroad company carelessly backed its cars against the plaintiff's intestate, and thus caused his death. In the other two cases, there was no active negligence, but simply an omission properly to fasten the cars, which without any human agency, moved, and thus ran against the persons injured. The recent case of *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; s. c., 54 Am. Rep. 718, was similar. There it was decided that a person who went upon the land of another, without invitation, to secure employment from the owner of the land, was not entitled to indemnity from such an owner for an injury received from a defective machine on the premises, not obviously dangerous, which he passed during the course of his journey; and that although it might be shown that the owner could have ascertained the defect by the exercise of reasonable care, yet that he owed no legal duty to a stranger so coming upon his premises which required him to keep the machinery in repair. That was plainly a case of mere passive negligence, an omission to keep a machine in repair which was not obviously dangerous. Here the ground of the defendant's liability is that its agents, engaged actively in its service, carelessly backed a car against the plaintiff and thus injured her. If she had been injured from a defect of the car or engine not obviously dangerous, the case would have been like the *Larmore* case. If the car had

Byrne v. New York Central and Hudson River Railroad Company.

moved upon her without any human agency, simply because it had not been sufficiently secured or fastened, then it would have been like the cases of *Nicholson* and *Sutton*.

There are points of resemblance and points of difference between the *Barry* case and the other cases. Taking the points of resemblance, a plausible argument may be made to show that the cases conflict. But taking the points of difference, then while the distinction between the *Barry* case and the other cases is not so plain as a travelled highway, it is sufficient to require the application of different principles, and the reaching of a different result.

The facts of this case, so far as they relate to the accident, are substantially the same as those proved upon the trial which was under review in 83 N. Y. 620, when this case first came to this court. Then we held that there was evidence sufficient for the consideration of the jury, both in reference to the plaintiff's contributory negligence and the negligence on the part of the defendant, and we see no reason to reconsider the conclusion in reference to those matters then reached. It is quite true that the evidence to establish freedom from negligence on the part of the plaintiff and negligence on the part of the defendant is very weak and liable to much criticism, and yet we are constrained to think, as we did before, that it was proper for submission to the jury.

There was evidence tending to show that no bell was rung or whistle blown upon the engine attached to the train in approaching this crossing, and the court charged the jury that the defendant was not absolutely bound to ring a bell or to blow a whistle, but that it was bound to give such notice or warning of the approaching train as was reasonable and proper under the circumstances; and that it was bound to give by bell, whistle or otherwise, such reasonable notice as the jury should find the circumstances required. The charge as thus made was excepted to on the part of the defendant, and its counsel requested the court to charge that if the bell was rung, as testified to by defendant's witnesses, that was a sufficient warning of the approach of the train, and that the defendant was not bound to give any other notice or warning. The judge refused so to charge and the defendant's counsel excepted. In these rulings, there was no error. The defendant was backing its train toward this crossing which was extensively and notoriously used by the public, and it was bound to use reasonable and ordinary care so as not to endanger those who might be lawfully upon

Becker v. Koch.

its track at that crossing. And what care and precautions, if any, besides ringing the bell, it should have taken upon a train thus backing were properly left for the jury to determine; and so it was held in the *Barry* case. There, as here, there was a dispute as to whether the bell was rung or the whistle blown as a warning for the approach of the train. There the court charged the jury that in running its cars the defendant was bound to give such notice and warning as in their judgment would be regarded as reasonable and proper and calculated fairly to protect the lives of persons using the crossing; that they were to determine whether in backing the train it observed that care and caution which was called for under the circumstances; and that it had a right to back the train, but under the circumstances of the case, the question was whether it had the right to back it without giving warning in some way to the intestate. The defendant's counsel then requested the judge to charge the jury that if the bell was rung, the defendant was not bound to give any other warning, and in reply to the request the judge said that he left it for the jury to determine whether under the circumstances the ringing of the bell would have been such a warning as was requisite. This court held that there was no error in the charge as made or the refusal to charge. Judge ANDREWS, in his opinion, said: "We think it cannot be held as matter of law, under the circumstances of this case, that the ringing of the bell fulfilled the whole duty resting upon the defendant."

We find no error in the record, and the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

BECKER V. KOCH.

(104 N. Y. 394.)

Witness — impeachment of hostile, by party calling him.

On an issue of fraud by an assignor, in the making of an assignment, defendant called the assignor as a witness. A portion of his testimony showed that he had provided for fictitious debts. This was followed by an explanation which if true, showed that he did in fact owe such debts. The trial court ruled that as the explanation stood uncontradicted by any other witness, defendant was bound by what the assignor had testified to, for the reason that he could not discredit or impeach him. *Held*, error; that the evidence should have been submitted to the jury for them to pass upon its credibility.

ACTION by general assignee to recover personal property. The opinion states the case. The plaintiff had judgment below.

Charles B. Wheeler, for appellant.

Baker & Schwartz, for respondents.

PECKHAM, J. This action was brought by the plaintiffs as assignees for the benefit of creditors of one Exstein, to recover from the defendant the possession of some personal property amounting in value to about \$4,000, or in default thereof to recover such value.

The defendant justified the taking of the property by virtue of a writ of attachment issued to him as sheriff of Erie county, in an action in which Victor and others were plaintiffs and Exstein was defendant, and under which writ the sheriff had levied upon this property as belonging to the said Exstein. The assignment to plaintiffs was made on the 17th of October, 1883, and included the property in question. The attachment was on the 14th of November levied on the property, and after the plaintiffs in the attachment suit recovered judgment against Exstein, the property was sold on an execution issued thereunder to the defendant. The answer in this action set up these facts and alleged that the assignment to the plaintiffs was made with the intent on the part of Exstein to hinder, delay and defraud his creditors. The action came on for trial in the Superior Court of Buffalo, and after the evidence was all in, the court directed a verdict for the plaintiffs for a return of the property to them or for the value thereof, assessing the same at \$3,800. A stay of proceedings was granted and the defendant's exceptions were ordered to be heard at the General Term in the first instance.

The General Term, after argument of such exceptions, overruled the same and directed judgment for the plaintiffs on the verdict. Thereupon an order was entered, which in form treated the defendant as having made a motion for a new trial on the exceptions ordered to be heard in the first instance at General Term, and after reciting such fact continued thus: "Ordered that such motion be and the same hereby is denied with costs; that the said exceptions be and the same hereby are overruled and judgment for the plaintiffs on the verdict is hereby ordered."

Judgment in accordance with the order was subsequently entered.

Becker v. Koch.

The defendant then appealed from the order above mentioned to this court, and also from the judgment entered upon such order.

[Minor points omitted.]

The court directed a verdict for the plaintiffs, and if therefore there was evidence enough to authorize a submission of the question of fraud to the jury the judgment must be reversed. We think there was, and had it not been for the rule of law adopted by the court below we suppose that court would have been of the same opinion. That rule was that as the defendant called a witness by whom he attempted to prove the fraud, and as that witness denied it, the defendant was bound by that denial, in the absence of contradiction by some other witness, even though the jury might think some parts of the evidence of the witness clearly showed its existence.

To show exactly how the question arose and what was decided by the court, some reference must be made to the testimony, although it will be unnecessary to allude to it all.

The assignor, Exstein, was a merchant engaged in a large business in Buffalo. He kept regular books of account in his business, which were produced upon the trial, and he was called as a witness for the defendant and gave evidence in relation to the books and upon other matters.

His assignment was made on the seventeenth of October, and on the sixteenth of that month he made entries in several accounts which he kept, crediting quite large sums of money to the different persons named in such accounts, the result of which entries was to cause it to appear by the books, that the assignor was in their debt to a somewhat large amount, while if the entries as of the sixteenth of October were stricken out, it would then appear that the parties instead of being creditors were in reality debtors of the assignor. When on the stand, he substantially stated that if those entries were stricken out, the state of affairs between himself and those persons would be as represented in the books, or in other words, that excluding those entries and the circumstances upon which they rested, some of these persons would be his debtors. He also said that these entries did not, in fact, represent any actual transaction occurring at the time when they were made, and that no valuable or other consideration passed between him and those parties at such time. Stopping with these facts, it would appear then that credits were given these persons the day before the assignment

upon which some of them drew out moneys from him, and upon the basis of which one was made a preferred creditor in the assignment, and yet such entries represented no actual, present transactions happening at the time when they were made.

Unexplained, it would appear that as a result Exstein had provided for the payment of large sums of money, or had already, and in view of his assignment, paid such sums to persons whom he did not owe, or in other words, he had paid and also made provision in his assignment for the payment of fictitious debts.

The defendant however proceeded with his examination of this witness, and asked for an explanation of these entries, and the facts or circumstances upon which they were based, and the witness proceeded to give it. The explanation was, if true, sufficient in law, and showed that he did owe the persons the amounts he claimed to, with the possible exception of one or two cases in which the defendant claims that even on the basis of the general truth of the explanation, the witness had charged himself in reality with more than he owed. The defendant then rested, and the plaintiffs, with the evidence in this state, asked for a verdict in their favor by the direction of the court, and obtained it.

The court held, in substance, that the books of the witness Exstein showed a *prima facie* case of an indebtedness of the witness in the amounts therein appearing, and to the persons therein mentioned, and the witness said they were correct. He then stated what has already been alluded to as to those entries made on the sixteenth of October, and continued by explaining the facts upon which they were based. This explanation, the court said, was totally uncontradicted by any other witness, and defendant was therefore bound by what Exstein said on that subject, for the reason that he could not discredit or impeach him, and must take what he said, as under the circumstances of the case, true.

If that were the true rule, the court was correct in directing a verdict. The General Term, it must be presumed, also took the same view of the case in directing judgment for the plaintiffs, without delivering any written opinion.

The general rule prohibiting the impeachment or discrediting of a witness by the party calling him was extended too far in this case. Here was an issue of fraud in the making of an assignment by the assignor, and the defendant, in order to prove its existence, called the very man as a witness whom he alleged was guilty of the

fraud. He might well be regarded therefore as an adverse witness, whom the party by the exigencies of his case was obliged to call.

With regard to such witnesses it is well settled that all the rules applicable to the examination of other witnesses do not in their strictness apply. An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist.

What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case.

Starkie, one of the ablest and most philosophical of English writers on this branch of the law, in speaking of a reluctant or adverse witness, used almost the precise language above stated and which has been substantially quoted from him. *Starkie Ev.* (9th ed.), m. p. 284. Sometimes rather loose language has been indulged in to the general effect that a party cannot impeach his own witness, but when an examination is made as to the limits of the rule the result will be found to be that it only prohibits this impeachment in three cases, viz.: (1) The calling of witnesses to impeach the general character of the witness; (2), the proof of prior contradictory statements by him; and (3), a contradiction of the witness by another where the only effect is to impeach and not to give any material evidence upon any issue in the case. *Lawrence v. Barker*, 5 Wend. 301-305; *People v. Safford*, 5 Den. 112; *Thompson v. Blanchard*, 4 N. Y. 303-311; *Coulter v. Express Co.*, 56 N. Y. 585; 2 *Starkie Ev.* (9th Am. ed.), m. p. 244-250; 2 *Phil. Ev.* (C. and H. & Ed. notes), m. p. 981, 982, 983 and note 602; 1 *Greenl. Ev.*, § 442. In regard to the first class the rule has been stated to rest upon the theory that when a party calls a witness he presents him to the jury as worthy of belief, and to allow him to call witnesses thereafter to impeach his general character as a man, would be to permit an experiment to be made upon the jury by producing a person as worthy of belief (whom he knows and has witnesses to prove to be the contrary), and if his evidence be favorable, to get the benefit of it, and if the reverse, to overwhelm it by the impeaching witnesses.

In such a case as this however there is no deception. The defendant calls the very man he accuses of the fraud as a witness to prove it and says, in effect, to the jury, that such evidence as the witness gives which tends to show the perpetration of the fraud alleged is forced from him by exigencies of the case and the surrounding facts which cannot be denied, while that which he gives that looks toward an explanation of the fraud the jury shall give such faith to as under all the facts in the case they may think it entitled to.

As to the second class, in which an impeachment is forbidden, the authorities in England were in conflict, many of the judges thinking it allowable to prove prior contradictory statements by a witness, but the weight of authority was against it, thereby creating the occasion for an interference by the legislature with the law of evidence, which passed an act permitting just such evidence under certain restrictions. See C. L. Pro., act of 1854, 17 and 18 Vict., chap. 125, § 22. The non-admissibility of such evidence in the courts of this State is, of course, not open to discussion. It is alluded to only to show the opinion of the English Parliament (in matters of this nature almost exclusively guided by lawyers), upon this question of impeaching one's own witness, and the readiness of that body to alter the law of evidence in the direction of what seemed to it greater opportunity of ascertaining and administering that for which all courts are instituted, viz., truth and justice.

The third of above classes, where no impeachment is allowed, is plainly set forth in several of the cases and text-books above cited.

It is not admissible, even in the case of a witness called by the other side, to impeach him by proof of prior contradictory statements on immaterial or collateral issues, and there is not much difference in the two cases, and therefore no reason why it should be allowed with reference to one's own witness. But all the cases concur in the right of a party to contradict his own witness by calling witnesses to prove a fact (material to the issue) to be otherwise than as sworn to by him, even when the necessary effect is to impeach him.

Why should not the right exist to show that a portion of the evidence of your own witness is untrue, by comparing it with another portion of the evidence of the same witness and with the other facts in the case?

The courts below say, in effect, that although a portion of Exstein's evidence shows that he provided for payment in his as-

Becker v. Koch.

signment for fictitious debts, yet the other portion of his evidence (if believed) shows that such debts were not fictitious, and although the defendant was at liberty to call other witnesses to prove that the explanation was false, yet as he did not do so, the explanation must stand as matter of law, and he cannot be heard to contend that it is proved false by its own absolute and inherent improbability. We do not believe, at least in such a case as this, that the rule goes to any such length.

The plaintiffs cite the case of *Branch v. Levy*, 46 Super. Ct. 428, as upholding the rule laid down by the trial court. The plaintiffs there brought an action to recover damages from defendants for the non-delivery of coupons bought from defendants' agent, as plaintiffs claimed, but defendants denied the agency and alleged they had sold the coupons to the person whom plaintiffs alleged was their agent, and had no liability for his subsequent acts. On the trial the plaintiffs sustained their claim *prima facie* by certain letters and circumstances, which as the court said, in the absence of explanation by defendants, made a question for the jury. The plaintiffs then, for some inexplicable reason, called one of the defendants who swore that the person selling the bonds to the plaintiffs was not the agent of the defendants, but that they had simply sold him the bonds. The court held the plaintiffs concluded by this evidence and that they must take it as wholly credible; that credibility could not be divided, and that it was attached to the moral character.

That case comes very near the one under discussion, and it is hard to see why the plaintiffs should not have been allowed to go to the jury upon the whole of their case, letters, documents and explanation, and why they should not have been allowed to ask the jury to believe the documents and letters, and reject the explanation as in their judgment untrue. To say that credibility is a part of the moral character and indivisible, is to run counter to the well-established rule as to adverse witnesses above referred to, whose testimony you may ask a jury to believe in part and to disbelieve the residue. The case ought not to be followed.

It is a good general rule that the credibility of a witness is matter for the jury, and the fewer technical obstructions there are to the practical operation of that rule the better.

We think that the whole evidence of Exstein in this case should have been submitted to the jury for them to pass upon its credi-

Hubbell v. City of Yonkers.

bility, and that they were at liberty to believe that portion which tended to show the debts to be fictitious and to disbelieve the explanation, or that they might regard it as sufficient, just as in their judgment, intelligently and honestly exercised, they might determine.

Of course we do not mean by this decision to give any intimation as to which view should be taken by the jury, we only decide that it was a question for them and not the court.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

HUBBELL V. CITY OF YONKERS.

(104 N. Y. 484.)

Municipal corporation — defect in street — absence of railing.

Plaintiff was driving in the day-time upon a street in a city, when his horse became so frightened at a bicycle that the driver lost control of him, and the horse left the road, stepped over the gutter and curb, and ran along the sidewalk, and went over an embankment twelve feet high, at a point where the street was graded up twelve feet, carrying with him the plaintiff. The road-bed of the street was thirty feet wide, and the sidewalks were ten feet wide, the curbstone eight inches high. The street had been in the same condition for ten years, and this was the first accident of the kind. *Held*, that the city was not liable for the consequent injury. (*See note*, p. 526.)

ACTION for damages for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Joseph F. Daly, for appellant.

Malcolm F. Keyes, for respondent.

PECKHAM, J. The plaintiff sustained an injury by falling over an embankment, while out riding in the city of Yonkers, and recovered damages in the trial court against the city for its negligence in the treatment of the street or highway of the city where the accident occurred. There is substantially no dispute about the facts upon which the defendant's liability is based, and briefly they are as follows: Linden street is a street in the city, running north and south, the road-bed in which was at the time in question

Hubbell v. City of Yonkers.

macadamized along its entire width of thirty feet and was in good condition. Sidewalks were placed on each side of the road-bed, ten feet wide, and separated from it by a curbstone eight inches high. On the west side of the west sidewalk there was an embankment at one point of the street, of about twelve feet deep, running some number of feet along the sidewalk, and not guarded by any fence, wall or other obstruction. It had been in this condition for ten or more years, or ever since the laying out and opening of the street, and so far as appears in the evidence, the accident in question was the first that had ever happened of such a nature. The accident happened on the 26th of May, 1883, about six o'clock P. M., and while it was daylight. The way in which it occurred may be told in the language of the plaintiff: "On the day of the accident I was going up the street and met my cousins, who were getting ready to take a drive, and as they were going down to the village I thought I would ride rather than walk. They drove south on Waverly street to Park Hill avenue, and then up to the hill to Linden street, and when we got along Linden street there was a bicycle came along and the horse became frightened at it and commenced to shy, and in trying to pull him away from there it pulled his head so that the blinds hid the embankment or stone wall, and in so doing he stepped off one foot, and the two young men were on the opposite side from the wall and they had a chance to get out, but I had no chance and I went over, and that was the last I remember until " etc. They were going north, and consequently, had this embankment on their left. Another witness for the plaintiff makes it perhaps a little plainer. He said: "I met a bicycle. I was driving, and my horse commenced to shy off and I tried to pull him on the right side of the street, but in spite of me he crowded off to the left. * * * The other young fellow that was in the wagon with me grabbed hold of the lines and helped me to pull, but we could not pull him to the——. In spite of us he ran off the bank. He did not run any considerable distance. He just shied right out and went off the bank. It was all very sudden. It was very quick; it could not be over ten seconds. I was in the middle of the wagon, Mr. Hubbell on the left side (west side) and Broth on the east. Broth jumped out as we went over the curb, and I jumped out as the horse jumped off the walk. Hubbell tried to jump out but did not have time. Horse, wagon and Hubbell all went over the embankment together." In regard to the horse,

Hubbell v. City of Yonkers.

the last witness said: "I have always driven the horse; he belonged to me. I met bicycles before and he never minded them. The bicycle came upon us suddenly. I saw it not very far ahead. * * I did not think the horse would run out at all and had no reason to believe that the horse would be frightened at it. Linden street is much travelled, and has been for these years, as far as I know."

Upon this evidence there can be no valid claim of any negligence on the part of the plaintiff, who was a young man of twenty years, nor upon the part of the driver of the wagon.

The only issue in the case arises as to the defendant's negligence. The city is not an insurer of the safety of persons travelling its streets, nor is it bound to furnish an absolutely safe and perfect highway under all circumstances. It is bound to exercise active vigilance toward keeping its streets in proper repair and still a street may be out of repair and no liability exists against the city therefor, depending upon the question whether the city had failed to exercise that active vigilance, which it was its duty to do. Here was a roadway in first rate condition for its entire width (thirty feet), and bounded on each side by a curb eight inches in height, and then separated from this western embankment by ten feet more of sidewalk. Can it be fairly maintained that there was any lack of that vigilance demanded from a city, in failing to fence this embankment from horses travelling on the road, which should at that particular spot become frightened and unmanageable, and should then rush over the curb-stone and across the sidewalk and jump down this embankment? We think not. We are of opinion that this was one of that class of accidents, whose occurrence is so rare, unexpected and unforeseen, that to hold the city responsible for a failure to guard against it, is to hold it to a most extensive liability, and to cause it to become substantially an insurer against any accident which human care, skill or foresight could prevent. This is a higher degree of responsibility than the law exacts. The very fact that for ten years or more this embankment had been in the same condition, and that so far as appears no similar accident had occurred, is most cogent evidence of the lack of any negligence on the part of the city in failing to guard this spot. It is upon this principle that several cases have been decided in this court, even with reference to carriers of passengers, in which case the law exacts a higher degree of care than it does in the case

Hubbell v. City of Yonkers.

of municipal corporations in relation to their highways. That which never happened before, and which in its character is such as not to naturally occur to prudent men, to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening and guarding against that remote contingency. See, on this subject, *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Cleveland v. Steamboat Co.*, 68 N. Y. 306; *Loftus v. Union Ferry Co.*, 81 N. Y. 455; s. c., 38 Am. Rep. 533.

This is unlike the cases of *Kennedy v. Mayor, etc.*, 73 N. Y. 365, s. c., 29 Am. Rep. 169; and *Macauley v. Mayor, etc.*, 67 N. Y. 602. In the first case it was very properly argued that the absence of the string piece on the dock was a plain neglect to do what ordinary prudence would suggest as proper in fulfillment of the duty of the city, to keep the dock in a safe condition, and that its absence was the proximate cause of the injury. This court held that in deciding the question arising upon granting a motion for a nonsuit, it was to be assumed that it was the duty of the city to put a string piece upon the dock, and that it had negligently omitted to perform it, and that there was no negligence on the part of the plaintiff in the management of the horse and cart. This was to be assumed because the evidence upon the question was such as to require its submission to the jury, instead of being passed upon adversely by the court.

The case of *Macauley* was where the negligence of the defendant caused the fright of the horse, and the fact that the horse was momentarily by fright beyond the control of the driver did not, as matter of law, excuse the defendant's negligence which caused the injury.

In both cases the injury resulted from a cause which the court said might be held by the jury to be the neglect of the defendant to perform its duty, while in this case we cannot see that as to drivers on this street there was any duty to fence this embankment, or that a failure to fence could be construed as negligence on the part of the city, for the reason already given, that an accident of this nature, caused by an unruly or uncontrollable horse, was such a remote and improbable occurrence that negligence could not be founded upon a failure to foresee and guard against it.

The principle is not altered by the special provision contained in the charter of defendant, giving it power through its common

council "to compel or cause the making and repairing of railings at exposed places in the streets."

"Exposed places," with reference to such a case as this, must mean "dangerous places," and considering the facts in this case, we do not think this was such a dangerous or exposed place that a failure to guard it with railings could fairly be called negligence.

The cases cited by plaintiff's counsel as to the duty of a town or city to guard the edge of a road passing along a precipice do not control the decision of this case. Those are cases where the roadway itself runs along such a place and danger from the want of a railing was naturally to be apprehended, while here the roadway was perfectly safe, in first class condition, bounded by a gutter or curb-stone eight inches high and ten feet of sidewalk, and where no danger from the embankment was possible until the horse should leave the road, drag his wagon over this curb-stone and sidewalk and then fall over the "exposed" place. This could not be done unless voluntarily or by reason of the fright of the horse making him uncontrollable, and as to the latter contingency we have already discussed it. The same reasons prevail as to railings on a bridge, for their absence would strike every one as a plain, if not criminal neglect of even ordinary care.

We think this accident was such a remote contingency that a failure to guard against it was not negligence, and it was error to submit the question to the jury.

The judgment should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed.

All concur except DANFORTH, J., not voting.

NOTE BY THE REPORTER.— See *Atlanta v. Wilson*, 60 Ga. 473 ; s. c., 27 Am. Rep. 396 ; *Moss v. Burlington*, 60 Iowa, 438 ; s. c., 46 Am. Rep. 82 ; *Barnes v. Chicopee*, 138 Mass. 67 ; s. c., 52 Am. Rep. 259 ; *Drew v. Sutton*, 55 Vt. 586 ; s. c., 45 Am. Rep. 644 ; *Beardsley v. Hartford*, 50 Conn. 529 ; s. c., 47 Am. Rep. 677 ; *Scranton v. Hill*, 102 Penn. St. 378 ; s. c., 48 Am. Rep. 211 ; *Fitzgerald v. Berlin*, 51 Wis. 81 ; s. c., 37 Am. Rep. 814 ; *Hey v. Philadelphia*, 81 Penn. St. 44 ; s. c., 22 Am. Rep. 793.

Dillon says (Mun. Corp., § 1005): "The duty is not an absolute one. Thus towns are not absolutely bound to fence or to erect barriers to prevent travellers from getting outside of the road or way. A municipal corporation may determine for itself to what extent it will guard against mere possible accidents

* * * But when a rail or barrier is reasonably necessary for the security of travellers on the road, which from its nature would be otherwise unsafe, it is negligence not to construct and maintain such barrier."

Hubbell v. City of Yonkers.

In *Borough of Pittston v. Hart*, 89 Penn. St. 389, at a point on one of the principal streets of a town of about ten thousand inhabitants, a railroad ran parallel with the street, but about twelve feet below its level. There was no railing at the side of the street. A team of horses became frightened at a passing engine, ran over this unguarded side, and the driver was seriously injured. *Held*, that the direct cause of the injury was the want of a proper barrier at the side of the street, and that under the circumstances the question of the negligence of the town authorities was properly left to the jury. The court said: "Complaint is made that the court below suffered the jury to pass upon the question, whether the borough officers were negligent in permitting this precipice to remain unfenced, and whether the plaintiff's loss resulted from that neglect. But we do not see how the court could have refused so to do. The accident happened directly from the want of a barrier between the street and the cut. The driver was not in fault; he managed his team as well as he could under the circumstances, but he had so little of either time or space in which to control and quiet his horses that his efforts were unavailing. It is true that without the frightening of the horses there would have been no accident; but the horse is naturally a timid animal, and is so liable to fright that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time. Horses abound, but horses that never frighten, or are never fractious, are exceedingly rare, and if roads were to be constructed only for such animals, there must needs be but little travelling upon them. We think it was well said in the case of *Lower Macungie Township v. Merkhoffer*, 71 Penn. St. 276, that it was no defense that by careful driving the accident might have been avoided, since that would fall far short of the purpose of a public highway. In the case of *Newlin Township v. Davis*, 77 Penn. St. 317, the accident occurred through the fright of a horse upon a bridge, unprotected by side railings; but it was not, in that case, pretended that the omission of such railing was not *per se* neglect, or that the fright of the horse relieved the township of liability. Now it is hard to understand why a precipice at the side of a narrow street does not require fencing quite as much as the sides of a bridge. Such in fact is the very point in *Macungie v. Merkhoffer*, for there it was held that the township was bound to fill up, or fence off, a dangerous excavation at the side of a public road. We can readily understand and excuse the want of precautions of this kind in wild and sparsely-settled portions of the State, for the finances of the townships are exhausted in the making of roads even of an inferior character; but we can neither understand nor excuse the motive of a borough of ten thousand inhabitants, in refusing to properly guard a place on its main thoroughfare, so dangerous as that now under consideration, especially when the expense of so doing would be but trifling. In *Hey v. Philadelphia City*, 81 Penn. St. 44; s. c., 22 Am. Rep. 733, we have a much stronger case for the defense than the one in hand, for there the roadway was of good width and at least partially protected by the sidewalk and curb; besides this, the driver had left his seat by jumping from the buggy — the horse had torn away from him, and it was whilst in its undirected flight that it went over the river bank. Here, on the other hand, we have not only the proximity of the railroad, but a very

Hubbell v. City of Yonkers.

narrow and wholly unprotected street, and we have also the driver maintaining his seat and endeavoring to guide his team to the very last moment. There is certainly then but little, if any, doubt but that the negligence of the borough authorities was the direct cause of the accident complained of, with its resulting damages."

In *Kelley v. City of Columbus*, 41 Ohio St. 263, the court said: "The plaintiff was walking along the sidewalk immediately before the accident occurred. The place where he fell into the excavation was about thirty feet from the sidewalk or street proper. The north end of the excavation did not come within thirty feet of the street. A person therefore in the ordinary use of the sidewalk would seem to have been out of all possible danger of falling into the excavation. If the excavation had been so near the street that a person had fallen into it while passing on the sidewalk and in the ordinary use of it, a liability for resulting injury would follow. This excavation was so far from the street that it could have caused no injury, except when the person passing along the sidewalk turned out of his way, as the plaintiff clearly did in this case, and went to it — unless the stone pavement from the sidewalk to the north end of the excavation is to be treated as a continuation of the sidewalk, and the liability of the city is to attach for all places of danger near to the sidewalk thus extended. If the continuation of the stone pavement beyond the street, by its direction and surroundings, misled the plaintiff into the belief that he was still on the street, and if he walked upon it not thinking and having no reason to think he was beyond the street, the liability of the city doubtless would continue. But if he knew, or if from the surroundings he ought to have known that while walking on the stone pavement between the street and the north end of the excavation, he was not in the street, but had turned out of it, he should no longer rely upon protection from dangerous places into which he might wander by following the stone pavement. If he had this knowledge his right to protection from dangerous places to which it might lead him was the same whether he walked on the stone pavement or on the natural surface of the ground. He says in his testimony that when Mr. Beals, who was with him, spoke of urinating, he said, 'then go off the street. It is quite clear from this statement that while the plaintiff was walking on the stone pavement, after he left the sidewalk, he knew he was out of and beyond the limits of the street. He did not go to the place where he received the injury because he thought or supposed that while he was going there he was in the street. He knew he was not in the street, and followed the pavement because it led away from the street. The plaintiff following the stone pavement under these circumstances is not entitled to protection from injury from places of danger adjacent to the pavement as if he had encountered similar dangers in the lawful and proper use of the sidewalk within the limits of the street."

In *Bunch v. Edenton*, 90 N. C. 181, it was held that a town is liable in damages to one who receives an injury by falling in an excavation near the sidewalk made by the owner of a lot for a cellar, where it appears there was no concurring negligence and the municipal authorities failed to cause to be erected a railing to prevent accidents to passers-by. The court said: "The

Hubbell v. City of Yonkers.

defendants insist that the excavation mentioned was not in the street, and therefore they are not liable. This defense is not tenable. It was immediately along the side of the street and rendered it precipitous and dangerous. Persons passing the street on foot go almost exclusively on the sidewalk, and there is generally much passing over them in the night-time. One walking on the sidewalk at any time, much oftener at night, especially in the absence of light, might, by accident, stumble and fall over the steep edge. Not infrequently, crowds of people pass along the sidewalk, and on such occasions, a misstep of one might precipitate one, two or more persons into the pit. The side of the street is a material part of it, and must be kept free from danger, however the same may arise, as well as other portions of the street. Pits and other dangerous places immediately adjoining it and near to it make it perilous, and such places are nuisances. When these are permitted to exist and the streets are not properly protected against them, the latter are not in reasonable repair * * *

In this case, the excavation was manifestly a dangerous one and a source of peril to everybody passing on the sidewalk, especially at night. It was tolerated for a month; no light was placed near it at night to warn the passenger; there was no railing to protect him, and a slight misstep might precipitate him over the perilous edge. It was the obvious duty of the defendants to abate such a nuisance, or if circumstances required that the place should remain open so long, then to compel the owner to place a railing along the edge of the street, or have it done at his expense."

In *Spaulding v. Inhabitants of Winslow*, 74 Me. 528, the plaintiff was traveling with his horse and wagon upon a road in the town of Winslow, when the horse took fright at a hole in a culvert upon the road, and by the action of the horse the wagon was carried into the adjoining ditch, and the plaintiff was thereby injured. By a statutory provision the defective culvert imposed no liability upon the town, not having been in existence for twenty-four hours before the accident happened. The defect complained of in the writ is the want of a railing between the travelled way and the ditch. *Held*, among other things, that there could be no recovery on that ground. The court said: "There are many thousands of such places within this State. If railings were required for them, towns would have extraordinary burdens to maintain their roads. The plaintiff had twenty three feet of width of road for his team about five feet wide, to pass over in the light of day. We feel well assured that some cause other than a defective way, for which the town was answerable, produced the accident."

In *City of Wyandotte v. Gibson*, 25 Kans. 236, the court said: "The general facts are, that the city, in grading Fourth street south from Minnesota avenue, made a cut in front of the residence of James A. Cruise of about forty feet in width and from twelve to fifteen feet in depth. As the street was eighty feet in width, there was a space of about twenty feet between the front fence around Mr. Cruise's lots and the edge of the embankment. Along this edge, no railing, light or other guard against accident was placed. On the evening of the injury, Mr. Gibson went to the house of Mr. Cruise to pay some money after transacting this business, he started home, and the night being very dark, fell off the embankment and received the injuries.

"Now the negligence imputed to the city was not in the manner in which the grading was done, or in grading only half the width of the street, for the work was properly done, and the width of the cut was a matter for the council to determine, but in leaving such an embankment in the street without railing, light or other guard against such accidents as that which befell plaintiff's intestate. Indeed the same question of negligence would arise if the embankment had been a natural one instead of being caused by the city's grading, though there might perhaps be a greater necessity for erecting barriers in the one case than in the other. Whether the omission was negligence depends on many things: the proximity to the business portion of the city; the amount of travel over the street; the depth of the cut; and indeed every other fact bearing upon the question of the probability of the occurrence of just such an accident as did in fact happen. There might be no negligence in leaving unprotected an embankment in an unfrequented street in a remote portion of the city, and yet the grossest negligence in leaving unprotected a similar embankment on the main street and in the heart of the city. And this question of negligence is one of fact for the jury, subject to the revising power of the court only when there is manifest error in their decision."

A town is not bound to erect barriers to prevent travellers from straying from a highway, although there is a dangerous place, at some distance from the highway, which they may reach by so straying. *Puffer v. Orange*, 122 Mass. 389. Followed in *Daily v. City of Worcester*, 181 Mass. 452.

PEOPLE V. O'SULLIVAN.

(104 N. Y. 481.)

Criminal law — rape — previous attempt — complaint — delay in making.

On a trial for rape, evidence of an unsuccessful attempt by the defendant a few days previous is competent.

Evidence of the first complaint of the prosecutrix, ten months after the offense, is incompetent.

The delay is not excused by threats of the defendant, a priest, to the prosecutrix at confession, that if she told of him she would go to hell.

CONVICTION of rape reversed at General Term. The opinion states the case.

Ceylon H. Lewis, for appellant.

John C. Hunt, for respondent.

EARL, J. The defendant was convicted in the Onondaga Over and Terminer of the crime of rape, committed upon Abbie O'Connor,

on the 6th day of May, 1884. He was a Roman Catholic priest in charge of a church at Camillus in Onondaga county. The complainant was a domestic working for him in the parsonage which adjoined the church. She testified that she was, at the time of the alleged crime, about seventeen years old; but there was other evidence, apparently more reliable, that she was about twenty. Before she went to live with him, she resided with her foster parents, who brought her up from infancy, and she and they were members of and regular attendants at his church. She went into his service on the 25th day of January, 1884, and from that time forward his family consisted of himself, Mrs. Doehner, his housekeeper, Timothy O'Sullivan, his man servant, and the complainant.

She testified that the defendant entered her bed-room in the night-time and there outraged her. At that time the housekeeper was in New York, and she was alone in the house with him and the man servant. No criminal complaint was made against him until November, 1885, and he was not indicted until January, 1886.

Upon the trial after the complainant had testified to the rape, she was permitted against the defendant's objection, to testify that four days previously he made an attempt to ravish her, that she resisted him and that he failed. For the reception of this evidence, the court at General Term, as appears by the opinion there pronounced and concurred in by a majority of the judges, reversed the conviction, holding that it was incompetent upon the trial of the defendant for the crime alleged to prove any other crime committed or attempted by him. We do not agree with the learned General Term in the view thus taken of this evidence. It is quite true that it is a general rule of law that upon the trial of a prisoner for one offense it is improper to prove that he has been guilty of other offenses; as where a prisoner is put upon trial for larceny, or burglary, or murder, it is incompetent to prove that he has been guilty of other larcenies or burglaries or murders or other crimes. In this case it would have been incompetent to prove that the defendant had committed or attempted to commit a rape upon any other woman. But where a prisoner is tried for a particular crime, it is always competent to show, upon the question of his guilt, that he had made an attempt at some prior time, not too distant, to commit the same offense. Upon the trial of a prisoner for murder it is competent to show that he had made previous threats or attempts to kill his victim. *People v. Jones*, 99 N. Y. 667. Upon the same

principle it must always be competent to show that one charged with rape had previously declared his intention to commit the offense, or had previously made an unsuccessful attempt to do so. In this case if witnesses, other than the complainant, could have been called, who witnessed the unsuccessful attempt of the defendant to ravish the complainant four days before the crime was in fact accomplished, no one would have questioned the competency of their evidence. And the evidence is not rendered incompetent because it comes from the complainant herself. It is not as valuable, or trustworthy, or important, as if it had come from other witnesses. It probably did not have a very important bearing with the jury, because unless they believed her evidence as to the principal offense they would not believe her evidence as to the prior attempt. But it may have had some tendency to corroborate her story as to the principal offense, and thus may have had some weight with the jury. But whether it was important or not there is no rule which condemns it, and there is abundant authority to justify its reception. *Whart. Crim. Ev.* 35, 46, 49; *State v. Knapp*, 45 N. H. 148, 156; *Strang v. People*, 24 Mich. 16; *Sharp v. State*, 15 Tex. App. 171; *Regina v. Rearden*, 4 F. & F. 76; *Regina v. Jones*, 4 L. R. 154; *Rex v. Chambers*, 3 Cox, Cr. C. 92; *Williams v. State*, 8 Humph. 585; *State v. Walters*, 45 Iowa, 389; *Com'rs v. Nichols*, 114 Mass. 285; s. c., 25 Am. Dec. 420; *Com'rs v. Lahey*, 14 Gray, 92; *Com'rs v. Merriam*, 14 Pick. 518; *State v. Marvin*, 35 N. H. 22; *State v. Wallace*, 9 N. H. 515; *State v. Way*, 5 Neb. 287; *Lawson v. State*, 20 Ala. 65; s. c. 56 Am. Dec. 182.

We do not agree therefore that the judgment should have been reversed on account of the reception of the evidence alluded to. But there is at least one other error disclosed by the record for which, we think, the conviction ought to have been reversed.

As before stated, the alleged rape was committed in defendant's house, on the 6th day of May, 1884. The complainant remained in his service from that time until the twentieth day of August following, without, in any manner, by speech, action or appearance, disclosing or intimating to any one that she had suffered this great wrong. During that time she visited her foster parents, whose place of residence was not far distant from Camillus, and saw them nearly every Sunday at church and at defendant's house, having full and free communication with them in defendant's absence. When she left the service of the defendant it was apparently not on

People v. O'Sullivan.

account of the crime that had been committed upon her, but because he whipped her for some trifling offense. Then she went home to live with her foster parents, and remained there until the tenth day of September, and then she went to Syracuse to work in a situation procured for her, at her request, by the defendant; and while living there, on the twenty-eighth day of March, she disclosed to Father Moriarty, a Roman Catholic priest, at confessional, that the assault had been committed upon her; and that was the first disclosure of the crime made by her to any person. Her testimony, as to this disclosure, was objected to and received under objection and exception. During all the time, from the sixth of May to the twenty-eighth of March, nearly eleven months, there was not a day when she could not have made a disclosure to some one. She was at perfect liberty to leave the defendant's house at any time, and she remained there of her own free will and consent. The only excuse put forth for the great delay in making the disclosure is based upon the following facts: She testified that after the assault upon her she went voluntarily, and without any solicitation of the defendant, to his confessional and confessed to him, while living with him, on three different occasions; and that on each occasion he asked her whether she had told any thing about the assault upon her, and she replied, "no, father," and he said, "God bless you, my child." She also testified that while she lived with him he told her it was a sin to "tell on a priest," and that if she ever "told on a priest" she would go to hell or purgatory. She further testified that she did not go to confessional again until the 28th day of March, 1885, when she made the disclosure to Father Moriarty, and that she told him about it the first time she went to his confessional.

It may well be that the fact that this disclosure was made at the confessional under the sanction of religion, gave it additional weight with the jury. But we are of opinion that such a disclosure, made nearly eleven months after the commission of the alleged assault, was too remote to be received in evidence. There was nothing whatever to justify the delay.

It is a general rule that the evidence of a witness can never be corroborated or confirmed by proof that the witness stated the same facts testified to in court on some occasion when not under oath. Such statements, like all hearsay evidence, are excluded as unsatisfactory and incompetent. But there is an exception to the rule in

the case of rape. The outrage in such a case upon a virtuous female is so great that there is a natural presumption that at the first suitable opportunity she would make disclosure of it; and she would be so far discredited if she did not make the disclosure, for the purpose of confirming her evidence where she is a witness, such disclosure may be received. But where the disclosure is not recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist, and the principle justifying its reception does not apply. In 1 Hale's Pleas of the Crown, 632, it is said that the "complainant must make fresh discovery and pursuit of the offense and offender, otherwise it carries a presumption that her suit is but malicious and feigned. In 1 East's Pleas of the Crown, 445, it is said that the evidence of the complainant "is confirmed if she presently discovered the offense and made pursuit for the offender; and that "her evidence is discredited if she concealed the injury for any considerable time after she had opportunity to complain," and the same language is substantially embodied in 4 Blackstone's Commentaries, 214. In *Baccio v. People*, 41 N. Y. 265, the defendant was indicted for rape, and upon the trial the prosecution was permitted to give evidence that the complainant disclosed the crime to her mother twenty-four days after its commission, and the conviction in that case was reversed on the ground that the mother of the complainant was permitted to testify in detail on her direct examination to the statements made to her by the complainant of the time and manner of the offense. Judge WOODRUFF, writing the opinion, said: "I was at first inclined to say that evidence of any complaint made so long after the alleged injury, and especially when forced from the daughter by the mother after her daughter had once declared that her injury was due to a fall, should not have been received at all from any person. The complaint was certainly not made recently after the alleged outrage. But in a case in which the fact of complaint is admissible, it is perhaps competent to explain the want of such early complaint by facts which show that it was impracticable, or that it was prevented by circumstances consistent with the natural impulse to complain thereof, so far at least as to destroy the presumption of falsehood derivable from concealment on the part of the female." In the course of his opinion the same learned judge said, that the rule admitting such declarations in cases of rape is an exception to the general rule excluding declara-

People v. O'Sullivan.

tions made out of court, by a person who has been or might be examined as a witness, and is properly confined within narrow limits; and he suggested that the reason for the admission of such declarations is, "that it is so natural as to be almost inevitable, that a female upon whom the crime has been committed will make immediate complaint thereof to her mother, or other confidential friend; and inasmuch as her failure to do so would be strong evidence that her affirmation on the subject, when examined as a witness, was false, that the prosecution may anticipate such a claim by affirmative proof that complaint was made."

In *Higgins v. People*, 58 N. Y. 377, the defendant was indicted for rape. In that case it appeared that the prosecutrix arrived in New York, an entire stranger, and having lost her baggage, she was inveigled into a basement on a pretense of finding it, where she was outraged. Upon coming out into the street she met a woman who asked her what was the matter, also a policeman who took her to the station house. To neither of these did she state the real offense; but it appeared that as soon after arriving at the station house as her excitement would admit, she stated the fact to the police captain. Upon these facts defendant's counsel requested the court to charge that, "if the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong, it is a circumstance against her, casting a great discredit on her testimony and tends strongly to disprove the truth of the accusation." This the court refused to charge, and it was held, that conceding the proposition to be entirely accurate, it was an abstract one, as there was no ground for saying that the disclosure was not sufficiently prompt, and it was not error therefore to refuse so to charge. CHURCH, C. J., writing the opinion, said: "The proposition which the court was requested to charge was substantially correct, although it is quite general and somewhat vague. Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt, but there is and can be no particular time specified. The rule is founded upon the

laws of human nature, which induce a female thus outraged to complain at the first opportunity. Such is the natural impulse of an honest female."

In Connecticut a more liberal rule as to disclosures made by a prosecutrix has been adopted than prevails in this State. *State v. De Wolf*, 8 Conn. 93; s. c., 20 Am. Dec. 90; *State v. Byrne*, 47 Conn. 465.

There it may be proved, not only that she made disclosures of the crime, but the details of the crime as she disclosed them may also be proved. In the two cases cited, the disclosures were made after a much longer time than in any other case which has come to our attention. In the first case the complainant was deaf and dumb, and the disclosure was made more than a year after the commission of the crime. But there she was prevented from making the disclosure by the threats and influence of the prisoner over her, and it was held, that her mental and physical condition were such as to furnish her an excuse for not making an earlier disclosure. In the other case the complainant did not make the disclosure until more than a year and a half after the commission of the crime. But she was only twelve years old, and the defendant was her step-father, and she was living in his family, and he threatened to take her life if she told her mother or anybody else what had happened. Under such circumstances it was held to be for the jury, in weighing her evidence, to determine what effect should be given to her failure to make an earlier disclosure.

It will be seen from these authorities that the very reason upon which the rule is based for the reception of such evidence requires that the disclosure should be recent and made at the first suitable opportunity. But there may be circumstances which will excuse delay, as when the prosecutrix is under the physical control of the defendant, when she is among strangers and there is no one in whom she can confide, when she is induced to silence by threats, and is so far within the power or reach of the defendant that the threats may be executed. In such and other like cases delay may be excused, and the disclosure may be proved, and all the facts submitted to the jury for them to determine what weight shall be given to the disclosure, and what effect the delay shall have. But here there was absolutely nothing to justify the great delay. There was no time after the commission of the offense when she could not have left the defendant's house. She was of mature age and near her friends and saw them frequently. She was in Syracuse,

People v. Smith.

having access to priests months before she made the disclosure. It does not appear from her evidence that she delayed the disclosure from fear of the defendant, or from any influence of superstition, or from the apprehension of consequences to herself in this life or in the life to come.

We think the delay, under such circumstances, was so great and so unjustifiable that as matter of law the disclosure should have been excluded as evidence, and that it was therefore error to receive it. If this disclosure was competent, then no disclosure, however distant from the time of the offense, could be excluded; and all such disclosures would have to be received and submitted to the jurors for such damaging effect as they would allow them to have. A disclosure at such a distant time is of no more value in a case of rape than it would be in a case of robbery, attempted murder, or any other crime. A disclosure in a case of rape has no legal value whatever unless it is the natural result of the horror and sense of wrong which would prompt every virtuous female to make outcry at the first suitable opportunity.

Our attention has also been called to error in the charge of the learned trial judge. We have carefully considered the charge and are constrained to believe that it was in part erroneous. But as we have reached the conclusion that for the error to which we have given particular attention the conviction was properly reversed, it is unnecessary to further notice the charge, as the error complained of is not likely to be repeated upon the new trial, if one should be had.

We therefore conclude that the order of the General Term should be affirmed.

All concur.

Order affirmed.

PEOPLE V. SMITH.

(104 N. Y. 491.)

Criminal law — dying declarations — preliminary examination — exceptions.

On a trial for murder, dying declarations being offered, the preliminary examination to ascertain their admissibility was conducted in presence of the jury. Certain parts of the declarations were allowed to go to the jury and others were excluded. *Held*, that exceptions could not be based on the reception in evidence on the preliminary examination of statements of the deceased not relating to the immediate circumstances of the death, and which were not allowed to go to the jury. (*See note*, p. 543.)

CONVICTION of murder in first degree. The opinion states the case.

Arthur C. Palmer and John O'Byrne, for appellant.

McKenzie Semple, for respondent.

FINCH, J. We all agree in this case that no error was committed upon the trial, unless as to the single point which, in the opinion of ANDREWS, J., is deemed sufficient ground for ordering a new trial. That opinion states fully and accurately the facts disclosed by the proofs, and shows that the killing was admitted, and the only issue that remained was whether the fatal shot was accidental or intentional. It further holds that when the admissibility of the dying declarations of Hannon were brought in question, it became the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of approaching and immediate death, and that such necessary preliminary examination might, in the discretion of the court, be conducted in the presence of the jury. When the dying declarations of Hannon were offered by the prosecution, the defense objected upon the ground that they were not such. The trial judge answered, in substance, that he could not determine that question until he knew whether or not they were made in anticipation of approaching death. The defense then claimed a right to cross-examine "upon that point." The judge answered, "not just yet," and finally said, before the preliminary examination began, "when the district-attorney gets the statements of the witness you may cross-examine and I will then determine whether it comes within the rule. At this stage of the case there seems to have been no room for a misunderstanding as to what was at the moment before the court. It was an issue of law to be determined by the court upon facts addressed to it and with which the jury had nothing whatever to do. The defense so understood it, for they sought to enter at once upon a cross-examination of the witness on that point. Everybody understood that the admission of any declarations of Hannon was stayed and barred, until upon the examination by the prosecution and the cross-examination by the defense the issue of admissibility should be tried and determined by the court. During the trial of that preliminary issue the jury

People v. Smith.

stood merely in the attitude of spectators. They had no concern with it, and knew from the statements of the court that they had not. They understood that out of its result something might come before them as evidence, or nothing, and that until the judge ruled, the facts developed were for his consideration and not for theirs. The fact that their presence was not error shows that in the judgment of the law a jury must be deemed capable of that amount of discrimination at least. And thus the trial of the preliminary issue before the court was entered upon with the complete knowledge and understanding of all parties. The district attorney proceeded at once to the precise point and proved the statement of Hannon to his mother, that he was "going to die." At the close of about one-half of a printed page, directed to the issue before the court, the prosecution said: "Now we think we have laid the foundation for declarations." The judge seems not to have been entirely satisfied. The mother had given to her son the doctor's assurance that he would get well. It had produced no apparent effect at the moment, but who could tell that if the rest of the conversation occurring thereafter should be disclosed there might not appear a hope of recovery born of that assurance, or a spirit of hatred and revenge inconsistent with the solemn truth of statements in the presence of death?

The prosecution had obtained enough for its purpose, but the court had a duty to its own conscience; a duty not to be hasty or to be misled, and to make sure that it fully and correctly understood the frame of mind of the deceased. The learned judge therefore continued the examination, and at some point the district attorney apparently aided in its progress, until the witness had disclosed, not a selected part, but the whole of what deceased said to her during the last two days of his life. Near its close Hannon spoke of the influence of Sweeny with the police. The prisoner's counsel asked the court, "will you admit this?" to which the judge replied: "I have not admitted any thing yet; I want to hear the whole statement made by the deceased before I determine whether I will or will not allow the alleged dying declaration in evidence." Nothing could be plainer or more direct than this. All that had been said by the witness was thus again declared to be purely tentative and preliminary, not yet evidence in the case and wholly directed to the enlightenment of the court in the performance of its duty. The statement, thus interrupted, was there-

upon finished in a single sentence more of about half a dozen lines. So far, no evidence of Hannon's declarations had been admitted at all. They had been repeated for the information of the court to enable it to perform the duty of ruling whether any, and if so, what portion of them were competent evidence to be submitted to the jury. Until some such ruling was made there could be nothing to which the prisoner could except as constituting legal error. What followed was in some respects out of regular order. The district attorney, dropping the entire subject of the conversations with the deceased, proceeded to examine her, not upon the preliminary issue, but upon matters relating to the main issue and belonging to the consideration of the jury. It would have been more regular to have first finished the preliminary issue. The prisoner's counsel however seems to have acquiesced. He had been told that he could cross-examine upon the preliminary issue when the prosecutor had finished. That time had come and he was at liberty, if he cared for the order of the proceeding, to interpose and assert the right which the court had promised to give him, and ask a decision of the preliminary issue before the trial proper was resumed. He did not do so. He chose to sit silent while the added proof, competent upon the main issue, was being submitted to the jury. When the district attorney closed his examination of the witness the prisoner's counsel asked three not very important questions, and then turning to the court said: "I move now to strike out all the evidence given by the witness, in regard to the interview with the deceased, upon the ground that it is inadmissible, for the reason that the necessary foundation has not been laid for such declarations." This motion was singularly inapt, except for one purpose. As no declarations had yet been received in evidence there were none to strike out, and the objection was to the whole of them when some were beyond doubt admissible. If the purpose was to draw from the court an admission that they had been received, or an assent to such a claim, that purpose failed, for the court said in answer to the motion: "As I understand the position of the matter now, it is this: Mr. O'Byrne claims the right to cross-examine the witness, in reference to what will be claimed by the district attorney as evidence of dying declarations, for the purpose of ascertaining whether it is admissible. Are you cross-examining on that point?" The prisoner's counsel replied: "I am not; I am in a general cross-examination." The answer suggested to the judge the pos-

People v. Smith.

sibility of some confusion, for he at once said: "You may enter on the record that the court will now permit the defendant's counsel to cross-examine the witness before passing upon the question of the admissibility of the alleged dying declarations made by the deceased to the witness, as testified to by her." To this the prisoner's counsel said: "We cannot be estopped by any such record as that; it is a monstrous proposition." Why that should have been said, after what had occurred, it is difficult to say. We do not mean to criticise the counsel, who bore the heavy responsibility of his client's life, or misinterpret his zeal, but at least we differ from him entirely. We see in the action of the trial court a steady purpose to keep the evidence of declarations out of the case until at a proper and suitable time it should be determined what, if any, were admissible. The counter-effort seemed to be to insist that the court stood in the position of having admitted in evidence what it is clear was never admitted at all. The cross-examination then proceeded. Before it closed it reverted to the declarations of deceased, which had been repeated to the court. The witness was asked if she recollected the interview clearly; if she thought her son was dying, why she did not send for a priest on Wednesday; what was the subject matter of deceased's conversation on Thursday, and what was the whole conversation between them. As the witness began to repeat it the counsel suddenly closed his cross-examination. The court then asked if it was finished, and receiving an affirmative answer, proceeded to determine the preliminary issue and decide what portion of the statement of the witness to the court should be admitted, and directed the stenographer to read to the jury, and he did read to them, "so much and such parts thereof as are embraced within black lines," and marked on the margin "allowed to stand as evidence of dying declarations," and ordered the balance to be "stricken from the evidence," and in view of what had occurred to the added pains to caution the jury to disregard what they had heard repeated but what the court decided it would not admit. Upon this state of facts I cannot resist the conviction that the declarations of Hannon, now objected to, were never admitted in evidence, but wholly excluded; and that the case is not at all one in which erroneous proof was first admitted and then sought to be stricken out, but one in which no error of admission existed which required correction. It seems sufficiently evident also that any doubt on the subject, and any confusion or mistake as to what was being done, was steadily

and persistently guarded against by the court, and the admissibility of the proposed evidence determined as soon as it could be done consistently with the right of cross-examination reserved to the defense.

Since there could be no valid exception to the admission of evidence which was never admitted, the only possible injury becomes whether the action of the court in acquiring the needed information on which to rule is itself the subject of our review. We do not see how it can be. It rests in the judicial discretion. It never goes to the jury except so far as admitted. Some means of information the court must have. The suggestion made is "that it should have confined the preliminary examination to the facts relating to the declarant's condition of body and mind at that time." That proposition, stated as a general rule for the guidance of trial judges in exercising their discretion, need not be doubted; but the inquiry will remain in each case, under its own peculiar circumstances, how far the examination should extend in order to ascertain with accuracy and reasonable certainty the mental condition and belief of the declarant. The exercise of that discretion was reviewable by the General Term, but is beyond our jurisdiction, unless we can see that such discretion was abused, and the action of the court arbitrary and without reason. We cannot say that. There was a motive which might fairly have operated upon the judicial mind to push the inquiry beyond the point at which the district attorney paused, and that motive was, as we have already suggested, to ascertain whether the assurance of survival, which the deceased had been told the doctors had given, became at any time so operative upon him as to awaken hope of life. With that circumstance before it the court might reasonably conclude that a part of what was said would scarcely furnish as safe a basis of judgment as the whole. We can readily see that the determination of the court to hear all that the deceased said before deciding whether any of it was admissible, should not be deemed arbitrary or an abuse of discretion under the existing facts. Suppose that it had turned out, as from what appeared seemed quite possible, that the very last thing said by Hannon, relating not at all to the facts of the shooting, had shown the presence of a lurking but confident hope of recovery. Singularly enough the prisoner's counsel illustrates the force of what we are saying by claiming in his able brief precisely such a result. He plants himself upon the very last words of Hannon, which closed the conversation with

People v. Smith.

his mother, and which were about Sweeney and the police, and argues that they show a hope of recovery. Hannon said "I am afraid, mother, you will get no satisfaction for your son." She replied, "Johnnie that can't be so." He answered, "I hope so, mother, because I would like to go agin them fellows." The counsel claims that the expression does bear somewhat upon Hannon's frame of mind, and yet without what preceded it, its occasion and even its accurate meaning might be lost to us. It does not appear to have been deemed sufficiently material by the learned trial judge to have affected his judgment, but he could not have known that in advance; and it is easy to see that it might have assumed a form which would have been very material. The hope of survival, the lingering belief that death is not inevitable may disclose itself to an observant mind where even the witness does not see it, and may come to the surface when the talk is far away from the facts of the killing and from the *res gestæ*. These suggestions show that the action of the court was, at least, not arbitrary and without some apparent reason, and so its discretion was not abused. The General Term, which had the power to review it, has held that the rights of the prisoner were not prejudiced, and its conclusion must therefore prevail.

The judgment should be affirmed.

All concur except ANDREWS and PECKHAM, JJ., dissenting.

NOTE BY THE REPORTER.—ANDREWS, J., dissenting, said: "I am of opinion that the court committed a legal error, under the circumstances, in permitting proof of declarations of the deceased in respect to facts not coming within the class of facts which may be proved by dying declarations, and that the error was not cured by striking these declarations from the record and directing the jury to disregard them. There is no doubt of the proposition stated by the counsel for the people that the question whether circumstances exist which make declarations admissible as dying declarations, is a preliminary fact to be determined by the court, and that it cannot be left to the jury to say whether the deceased thought he was dying or not, for that must be decided by the judge before he permits the declarations to be given in evidence. This was decided at a conference of all the judges of England in 1790, and has been generally accepted as the rule in this country. 8 Russ. on Cr. (4th Eng. ed.) 266. and cases cited; *Donnelly v. State*, 2 Dutch. 463; 1 Whart. Crim. Ev., § 681. It is a necessary result of this doctrine, that the court must in the first instance hear the evidence bearing upon the condition of the declarant and his sense of impending death. If on this inquiry the court determines that the circumstances justify the introduction of dying declarations, then on their being offered the question whether they relate to facts which may be proved by

People v. Smith.

dying declarations arises, and is to be determined by the court in the ordinary way. It is also well settled that dying declarations relating to transactions prior to the homicide, and not a part of the *res gesta*, are not admissible. The rule is stated by ABBOTT, Ch. J., in *Rex v. Mead*, 2 Barn. & Ad. 603, in language often quoted with approval, 'that evidence of this description is only admissible where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration.' 1 Greenl. Ev., § 156; *People v. Davis*, 56 N. Y. 95; *Ins. Co. v. Mosely*, 8 Wall. 397. The declarations of Hannon to which we have referred, which were stricken out by the court, were clearly inadmissible under the rule, and were calculated seriously to prejudice the defendant. They supplemented with great force the evidence tending to show concert, deliberation and premeditation. We think it was the duty of the court to confine the preliminary examination to the declarant's condition of mind and body at the time. The whole examination was taken before the jury in the ordinary manner of taking testimony on the trial of an issue. It was, we think, the duty of the court, in fairness to the prisoner, and a discreet administration of the criminal law required the court, to have called the attention of the witness on the preliminary inquiry to the particular point to which the inquiry was directed, and not to have permitted her to testify to declarations not only irrelevant to the preliminary fact, but inadmissible on the main issue. The court not only omitted to call the attention of the witness to the point, but refused to permit the defendant's counsel to examine her on the preliminary question until after the examination of the district attorney, covering the whole interview, had been concluded. The testimony stricken out was received after all the testimony admitted bearing upon the preliminary inquiry had been elicited. The part stricken out was evidence received subsequent to the evidence retained. A witness called to testify to dying declarations may, on the preliminary examination, through ignorance or want of discrimination, intermingle declarations of the deceased as to her apprehension of death, with declarations relating to the crime. Such prejudice as the defendant might suffer in such a case he would have to bear as an unavoidable incident of the trial. But that is not this case.

"We think the judge erred, and that according to the suggestion of the court, made to counsel on the trial, an exception must be deemed to have been taken to the objectionable evidence, and we think it quite clear that the error was not cured by striking it from the record and instructing the jury to disregard it. *Erben v. Lorillard*, 19 N. Y. 299; *Lindsay v. People*, 68 N. Y. 148, 154, ALLEN, J.; *Furst v. Second Ave. R. Co.*, 72 N. Y. 542."

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

IN RE COWDERY.

(69 Cal. 22.)

Attorney — disbarment — city attorney.

The respondent was the salaried attorney of the city and county of San Francisco, having control of all its litigations. During his term of office he appealed from judgments rendered against it in certain cases in which he had no personal knowledge of the questions involved. After the expiration of his term he agreed with the attorney for the adverse parties, for a pecuniary consideration, not to be retained in those cases by the city and county. *Held*, unprofessional conduct for which he should be temporarily disbarred.

DISBARMENT proceedings. The opinion states the case.

William Matthews, E. R. Taylor, and H. J. Tilden, committee of San Francisco Bar Association, for relators.

John F. Swift and Selden S. Wright, for respondent.

THORNTON, J. J. F. Cowdery, at the times hereafter mentioned and prior thereto an attorney and counselor of this court, is accused as follows: That Cowdery was in December, 1881, the attorney and counselor of the city and county of San Francisco, and continued so to be up to the fifth day of January, 1883; that while he was such

In re Cowdery.

attorney and counselor he took appeals in the cases of *Bonnet v. City and County of San Francisco* and *Parker v. City and County of San Francisco* from the judgments which had been given and made in each of said cases against the city and county, which appeals were pending at the expiration of his term of office; that after the expiration of his term of office and in April, 1883, he informed one D. H. Whittemore, also an attorney and counselor of this court, that there was a point in each of said causes which would be fatal to the respondents if it was presented to this court; that thereupon Whittemore, in consideration that he would not disclose the point to his successor in office, and would not be retained by said city and county to represent it in either of said cases, paid to him \$100; that he agreed in consideration of such payment and promised Whittemore that he would not disclose to any person the point and would not permit himself to be retained in either of said cases by the city and county; that he performed no professional or other services for this payment, and that it was not expected that he should; that at the time of the said agreement and said payment both Cowdery and Whittemore believed that said point if presented to this court would result in reversing the judgments above mentioned; that by reason of the foregoing, Cowdery has violated his oath as attorney and counsellor at law, and the duties imposed on him, and should be removed from his office as attorney and counsellor.

In his answer Cowdery denies the following averments: That he ever told Whittemore that there was a point in either of the cases above mentioned which would be fatal if presented to the Supreme Court; that Whittemore, in consideration that respondent would not disclose such or any point to his successor in office, and would not be retained by the city and county to represent it in either of said cases, paid to him \$100; that in consideration of the payment of this sum of money, he promised Whittemore or any other person that he would not disclose to any person any point in the cases or either of them; that at the time of the agreement between him and Whittemore, he, Cowdery, believed that the point alluded to would result in reversing the judgment in each or either of these causes.

On the issues joined the cause came on for trial in this court.

The statute of this State provides that "every person on his admission (as attorney and counsellor at law) must take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of

In re Cowdery.

an attorney and counsellor at law to the best of his knowledge and ability." Code Civ. Proc., § 278.

- It is provided in section 282, Code of Civil Procedure, *inter alia*, that it is the duty of an attorney and counsellor at law:

"1. To support the Constitution and laws of the United States and of this State.

* * * * *

"5. To maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client."

In section 287, Code of Civil Procedure, it is provided that:

"An attorney or counsellor may be removed or suspended by the Supreme Court, or any department thereof, or by any Superior Court of the State, for either of the following causes, arising after his admission to practice :

* * * * *

"2. * * * Any violation of the oath taken by him, or of his duties as such attorney and counsellor."

The duties of an attorney and counsellor at law spring from his obligations, and those obligations are defined and limited by law. One of the principal obligations which bind him is that of fidelity under all circumstances to his client, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. Code Civ. Proc., § 282. This obligation is a very high and stringent one. If it is ever relaxed it is under exceptional circumstances, which rarely occur. If relaxed without the consent of the client, it is of most infrequent occurrence. The public is interested in the strict maintenance of this obligation, for without it there can be no assurance that the duties which devolve upon such officials as ministers of justice will be properly discharged. It is essential to the administration of justice and of the respect which the tribunals for its administration should command, that these officers should discharge with the highest fidelity, and with the utmost good faith, the responsible duties which devolve on them.

The following facts are, in our opinion, established in the cause: The respondent, in December, 1881, entered upon the discharge of his duties as attorney and counsellor for the city and county of San Francisco, having been elected to that position at an election held a short time before. He continued to be such attorney until the first Monday in January, 1883 (5th of that month), when his term

expired. When he went into office there were a large number of cases pending (some eight hundred), in which the city and county was a party, involving street work, and which were in his office; that he was unable to make himself acquainted with the merits of all these cases during his one year's incumbency; that he was not acquainted with the two cases whose titles are given above. These two cases were pending when respondent took office. They had been tried in the court below, and judgments had been rendered against the city, and motions for new trials had been made and denied. That he knew nothing of the facts or law points involved in them, but determined to appeal them, as a matter of official care and caution, and directed his assistants to appeal all cases to this court which were in a condition to be appealed. That the two cases aforementioned were with others so appealed. and the transcripts brought up to this court. That in December, 1882, D. H. Whittemore called on him, and asked him to stipulate to advance these causes on the calendar of this court. That he refused to stipulate, saying that he did not wish to hamper his successor, who would in a few days come into office. That he never knew at any time any thing of the testimony or of the questions of law or fact involved in the cases, and had never read the transcript, and knew nothing of the testimony in either of these cases. That in a report sent to the board of supervisors, and signed by him as such attorney and counsellor, these cases were mentioned as pending in the Supreme Court, but though this report was signed by him, he had never read it and did not know its contents. On or about the 12th day of April, 1883, he met Whittemore on Montgomery street, in the city of San Francisco, and had a conversation with him. The Supreme Court on the 10th of April, 1883, affirmed the judgments in the *Bonnet* and *Parker* cases above mentioned. Respondent was aware of this when he had the conversation with Whittemore on the twelfth of the same month. He said to Whittemore: "Hallo! You have won your *Parker* case. Now you have won your case, how are you going to get your money? Does not the *Brickwedel* decision cut you off?" He said he would see about getting his money, and I said: "Whittemore, did they raise the point on you that I raised in the *Blum* and *Lieu* case, that there was not sufficient allegation of presentation of claim to the board of supervisors before suit?" He said: "No; there is nothing in that point anyway. The Supreme Court has decided it twice in the *Gurney* and

In re Cowdery.

Parker cases, and I care nothing about it. If there is, there could only be a delay for a new trial; it is nothing on the merits. As a matter of fact, the complaint alleged presentation and rejection by the supervisors, and the court had found in both cases that the claims had been presented and rejected." After some remarks about one Sam Davis buying the judgments, he (Whittemore) said to him: "Are you in a position to accept a fee in this case?" To which respondent replied: "Yes; I have had nothing to do with the cases and know nothing about them, and had not been employed by the city, and I thought I was in a condition to accept a fee." Respondent said at the same time: "Mr. Whittemore, I can do nothing against the city in this case and I do not want for appearance's sake, to be consulted in them." He (Whittemore) said he did not want him to do any thing in the case. All that he wanted was that he should not be employed against him. Respondent said: "All right. The city had not attempted to employ me, and she had got other counsel, and that I would accept \$100." On the same day or the next this money was sent by Whittemore to respondent. After this employment Cowdery had nothing further to do with the cases. He offered to give any information to his successor, Craig, about any cases in his office. Isaac N. Thorne had the management of these and other street cases as an assistant to Cowdery, and Thorne was directed to give all information about these and all other cases in the office to Craig. It does not appear that any information was ever given to Craig by either of them in relation to the *Bonnet* and *Parker* cases. Respondent was a salaried officer of the city and county, and received all the salary due him. He was furnished with assistants who were also paid salaries during their employment as assistants.

It is contended that Cowdery violated his duty as attorney and counsellor in accepting this employment from Whittemore in the *Bonnet* and *Parker* cases, after having had control of them as the attorney and counsellor for the city; that having been the attorney and counsel of said city while the causes were pending, he could not accept any employment in regard to them which would put him in a position hostile to his former client; on the other hand the contention is, that Cowdery having acquired no knowledge of the facts and received no confidential communications from his client in the cases after the expiration of his term of office, he was at liberty to be employed by the adverse party.

The questions arising on these contentions have been elaborately argued, and are before us for decision.

[The court then reviewed at great length the case of *Cholmondeley v. Clinton*, 19 Ves. 261; s. c., Coop. 80; *Robinson v. Mullett*, 4 Price, 353; *Bricheno v. Thorp*, Jacob, 200; *Beer v. Ward*, Jacob, 77; *Davies v. Clough*, 8 Sim. 262; *Grissell v. Peto*, 9 Bing. 1; *Johnson v. Marriott*, 4 Tyrw. 78; s. c., 2 Cromp. & M. 183; 2 Dowl. Pr. 343.]

The cases above cited do not hold that an attorney or solicitor, when discharged by his client, though he may be employed by his adversary, can make use of the secrets in relation to the cause obtained from his former client. On the contrary, we understand the cases to hold that a court would restrain an attorney or solicitor from such conduct, and if he could not be otherwise restrained, it would punish such betrayal of confidence by striking him from the roll. In *Johnson v. Marriott*, the court refused to act from lack of evidence. If the evidence had been sufficient, would not the defendant have been restrained? We are of opinion that the court in that case would have restrained him, even when he had been unjustly discharged, and he was allowed, as contended, to be employed by the adversary party.

The law secures to the client the privilege of objecting at all times and forever to an attorney, solicitor, or counsel from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor, or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law. *Wilson v. Rastall*, 4 Term Rep. 753; *Vaillant v. Dodermead*, 2 Atk. 524; *Sandford v. Remington*, 2 Ves. Jr. 189, note. The cases cited on the other side are *Wilson v. State*, 16 Ind. 392; *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 137; *Herrick v. Catley*, 1 Daly, 512; *White v. Haffaker*, 27 Ill. 349; *Gaulden v. State*, 11 Ga. 47; *Valentine v. Stewart*, 15 Cal. 387-401; *People v. Spencer*, 61 Cal. 128.

[Omitting a long review of these.]

Monell in his work on Practice cites Ferguson's Irish Practice (a book to which we have not had access), and makes an extract from it (see 1 Monell's Pr. 182, 183) as to an attorney changing sides in the same cause. Ferguson says (1 Ferguson's Ir. Pr. 37, 38): "Lest any temptation should exist to violate professional confidence, or to make any improper use of the information which an attorney has

acquired confidentially, as well as upon principles of public policy, he will not be permitted to be concerned on one side of the proceedings, in which he was originally in a different interest, even though his former client makes no objection ; and though discharged many years ago, and feeling himself free to swear that he has forgotten the nature and purport of the communications he had received from the former client, and that they were not confidential ; for the court cannot investigate the *plus* or the *minus* of the confidence reposed in him without an absolute disclosure of the facts, nor can it calculate how much of these confidential communications are still in the recollection of the attorney ; but the mere circumstance of a retainer sufficiently implies the fact of confidential disclosure, to whatever extent, having been made."

Monell cites, as to this extract from Ferguson, *Lessee of Flynn v. Marshall*, 1 Ir. L. R. (O. S.) 59 ; *Hutchins v. Hutchins*, 1 Hogan, 315 ; *Keon v. Nesbitt*, 1 Sause & Scully, 365, note ; *Waller v. Fowler*, 3 id. 369.

It should be remarked in regard to the cases cited from the English reports that they all relate to attorneys or solicitors, not to counsellors or barristers. In this State, a person is admitted to the bar as both attorney and counselor, as the respondent here was, and this case is to be looked at in both aspects.

It should be remembered that in England an attorney can only recover his bill of costs and necessary disbursements. A barrister has no action to recover compensation for his services. The attorney cannot recover damages for a breach of contract. With us it is otherwise. Both the attorney and counsellor can with us maintain an action for a breach of his contract of employment, and recover compensation therefor in damages. So when an attorney or counselor is unjustly discharged from a case, he can in this State recover compensation for any damage he may sustain by reason of such discharge. Owing to this difference of right, the law may be ruled in England in accordance with the contention of respondent.

Further, the respondent cannot be regarded as an attorney and counsellor discharged by his client, the city and county of San Francisco. He was elected for a particular period of time or term, and when his term of office expired he was in no sense discharged. He took the term voluntarily, and by operation of law his employment ceased when his term ended. There is no analogy between the respondent's case and that of a private person discharging his attor-

ney or counsel from a cause while it was pending. On this point, the remarks of the Supreme Court of Georgia in *Gaulden v. State*, 11 Ga. 50, above cited, are applicable, and we concur with what is there said on this point. But though his employment ceased, his obligation of fidelity still continued, and nothing appears to have occurred which discharged him from this obligation. Indeed, we much doubt whether the city and county had power to discharge him. Is there any law authorizing it?

This question however does not arise here, and we do not intend to decide it.

The respondent accepted a fee in the two cases above referred to to sit out or stand out, and did nothing at all in such cases. He bargained for and received a fee of \$100 for so doing. He had previously received of the city a fee in such cases in the shape of his salary which was paid him.

Conceding that an attorney and counsellor at law may be retained not to act or advise professionally adversely to the person so retaining him, can this be the case where he had been previously employed or retained and paid in the same cause by the adverse party? We think not. The case cited, *McQuasney v. Heister*, 33 Penn. St. 444, does not go so far. No case has been cited, nor have we been able to find one, where a counsellor at law, who has been employed and received a fee from one party, has been afterward allowed to change sides and accept a retainer from his adversary in the same cause. See Sharswood's *Legal Ethics* (5th ed.), 117, 118.

Some remarks were made by Lord ELDON in *Cholmondeley v. Clinton* which are pertinent just here. "I recollect," he said, "many instances, both as to counsel and attorneys, in which it was extremely difficult for a man to say he should have been employed in both causes; and with regard to that, *quod dubitas no feceris* is a good rule for the regulation of your own conduct; but I do not recollect an instance of a solicitor changing his situation from the defendant to the plaintiff. The case might easily be put that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connection with the case, and yet the whole title of his former client might depend on it." 19 Ves. 266, 267.

Further he said: "The naked question is, whether a person, having been for a considerable time employed in a cause for the plaintiff, can, after discharging himself, as I must take Mr. Mont-

In re Cowdery.

rior to have done, from the relation of attorney for the plaintiff in that cause, became attorney for the defendant. The answer to the novelty of the application is, that the question must be considered open, unless in memory or tradition any instance can be shown of such a fact having actually occurred. I do not recollect, either in my own experience or from information in the memory of any one, any such instance. The practice of the bar in my time was this: If a retainer was sent by a party against whom the counsel had been employed, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client, stating the circumstance, and giving him the option. That has, I believe, been relaxed; and the course now is as it has been represented at the bar. I do not admit that he has bound to accept the new brief. My opinion is, that he ought not, if he knows any thing that may be prejudicial to the former client, to accept the new brief, though that client refused to retain him." 19 Ves. 247, 275.

These opinions of Lord ELDON go very far, and lay down a very strict rule as to the duties and obligations of attorneys and counsel. It is not based merely on sentiment, but on the rules of duty governing the relation as fixed by law. It will be observed that the lord chancellor is speaking of counsel as well as attorneys.

The lord chancellor refers in the above remarks to the course as represented at the bar. In the argument against the motion it was said: "If a counsel having advised upon pleadings and evidence, not being retained, the next day receives a retainer on the other side, which he is not only entitled but as a servant of the public bound to receive, there is no practice requiring notice to be given of that. This applies equally to the other branch of the profession." 19 Ves. 268.

In reply to this, Sir SAMUEL ROMILLY for the motion said: "I do not understand the rule as to counsel to be as it is represented. I concur that a counsel consulted confidentially cannot counsel on the opposite side without giving notice. Great laxity, I admit, prevails as to retainers; a difficulty, when it occurs, is usually referred to some other counsel; and the consequence is, that there is no general rule." 19 Ves. 269. The counsel further stated, "it is admitted, a counsel cannot reject a retainer, and accept one from the opponent." 19 Ves. 271.

And in this view, as to a solicitor, Lord ELDON concurred. In Cooper, 89, he said: "I consider the question to be nakedly,
VOL. LVIII — 70

In re Cowdery.

whether a person having been long officiating in a cause as the solicitor, and afterward discharging himself, as I must take it, that Montrion did in this case, by the dissolution of partnership, can afterward become the attorney on the other side in the cause." Coop. 87. This question he decided, and held against Montrion. See his observations on page 89.

As we understand the case, the ruling was not on the ground that Montrion personally knew the facts communicated by Lord Clinton, but his partner knew them, and under such circumstances Montrion was restrained from using it as solicitor for Earl Cholmondeley.

In this case, the respondent agreed to sit out or stand out, and not argue the causes in the Supreme Court. He was thus to refrain from exercising the functions of counsellor or barrister. He was to do this in cases where he had been employed and paid to act for a former client. He was not discharged by such former client. By the agreement he entered into, he could not be employed by his former client. It was a violation of his duty of fidelity to his client as attorney and counsel to be employed and paid under such circumstances. We are of opinion that the rule laid down in *Spencer's* case is correct, and should be enforced. It is the better rule, and one calculated to insure purity in the administration of justice, and command the confidence of the public in its administration. See 1 Monell Pr. 182, 183.

It should be remembered that the respondent filled a public office, and the highest obligation of fidelity to the public rested on him. A proper public policy dictates that one employed by the choice of the people for a stated period, in the capacity of attorney and counsel for the State, or any portion of it, should not be allowed to say that he had received no confidential communications in his official capacity, and therefore that he was at liberty to be retained by the adversary in the same cause after his term of office had expired. It would be placing before gentlemen of the bar a temptation to neglect their duties when called to such public employment, which no principle of law justifies. A just public policy forbids it. A trustee for sale is not allowed to be a purchaser at his own sale, and *e converso*, on like grounds. See *Michoud v. Girod*, 4 How. 554, 555. A great jurist, Lord LYNTHURST, has said that the rule as to a trustee dealing with his *cestui que trust* had its origin in considerations of public policy, also as to transactions between

In re Cowdery.

attorneys and their clients. See *Egerton v. Browalew*, 4 H. L. Cas. 160, 161. These considerations of public policy apply here. See remarks of court in the case above cited from 11 Georgia.

Let it be observed that the respondent knew that the cases above named were pending and undecided. Whittemore had spoken to him in regard to them before the expiry of his official term. It is immaterial that he did not know all the evidence in the causes. He might have ascertained all the facts by inquiry. That he failed to inquire as to the facts can make no difference. The record was open to him. His abstention from knowledge of the facts then is immaterial. In a case where a counsellor at law has argued a cause for his client in an appellate court, and where he has obtained his knowledge of the facts from the record alone, would it be permitted that in case of reversal of the judgment that he should change sides and conduct the cause in the court below for the adversary of his former client? Or where the same cause comes again to the Court of Appeal, that he could appear for the party opposed to that one for whom he had formerly appeared and spoken? Certainly he could not be permitted so to act. What confidence would be reposed in the administration of the law if such conduct would be allowed? With what safety could a client act in retaining an attorney and counsellor? Mr. Weeks, in his book on Attorneys at Law, says an attorney may be stricken from the rolls for acting in an action or suit on both sides. Weeks Attorneys, § 81, p. 152, citing *Masais'* case, 1 Keen, 74, and *Berry v. Jenkins*, 3 Bing. 423.

The measure of punishment is a difficult question. But it should be remembered that at the time Mr. Cowdery accepted this employment, *Spencer's* case had been decided, on September 21, 1882, by this court, and it should also be remembered that at the time Cowdery was employed by Whittemore, he said to the latter, as quoted above: "I can do nothing against the city in this case, and I do not want, for appearance's sake, to be consulted in them," thus showing that the respondent had doubts as to the propriety of his conduct.

On a consideration of the whole case, we are of opinion that the respondent should be suspended from acting as attorney and counsellor at law in any matter for the period of six months from the entry of the order herein.

The following order will be entered:

Colton v. Onderdonk.

In this cause, after hearing the evidence and considering the same, together with the pleadings herein, it is ordered that the respondent, J. F. Cowdery, be suspended from acting as attorney and counsellor at law in any court in this State for the period of six months from this date.

Rehearing denied.

McKINSTRY, McKEE and ROSS, JJ., concurred; SHARPSTEIN, J., not present, MYRICK, J., dissented.

COLTON v. ONDERDONK.

(60 Cal. 155.)

Nuisance — blasting — injury to adjacent property.

The owner of a city lot, blasting rocks on his lot with gunpowder, is liable for the natural and proximate injury to adjacent property, whether from contact of rock or from concussion.

ACTION for injury to a dwelling-house by blasting. The opinion states the case. The plaintiff had judgment below.

Fox & Kellogg, for appellant.

Stanly, Stoney & Hayes, and *Crittenden Thornton*, for respondent.

FOOTE, C. The plaintiff instituted this action for the recovery of damages, which she claimed the defendant had caused to her dwelling-house while he was engaged in blasting rock in grading another lot adjoining that on which the plaintiff's dwelling stood.

The cause being tried by a jury, their verdict was in favor of Mrs. Colton for \$7,500; this was on the 19th of March, 1883. Afterward on the 19th of June, 1883, a judgment thereon was rendered for the sum of \$7,631.25, and interest from said date at seven per cent per annum, together with costs and disbursements in the sum of \$464.45. From said judgment and an order refusing his motion for a new trial, the defendant appeals.

[Omitting minor points.]

The fact that the defendant used quantities of gunpowder, a violent and dangerous explosive, to blast out rocks upon his own lot, contiguous to another person's, situate in a large city, must be

Colton v. Onderdonk.

taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling-house as the natural and proximate result of his blasting. For an act which in many cases is in itself lawful becomes unlawful when by it damage has accrued to the property of another.

And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant was caused by rocks thrown against Mrs. Colton's dwelling-house or a concussion of the air around it, which had either damaged or entirely destroyed it.

The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken. Add. Torts, 9; *Transportation Co. v. Chicago*, 99 U. S. 635-644; *Loosee v. Buchanan*, 51 N. Y. 479; s. c., 10 Am. Rep. 623; explaining *Hay v. Cohoes Co.*, 2 N. Y. 159-162; s. c., 51 Am. Dec. 279; *Pixley v. Clark*, 35 N. Y. 520-532; *Heeg v. Licht*, 80 N. Y. 579-583; s. c., 36 Am. Rep. 654; *Tiffin v. McCormack*, 34 Ohio St. 644; *Carvon v. R. Co.*, 4 Ohio St. 417-418; *Sutton v. Clarke*, 6 Taunt. 44; *Joliet v. Harwood*, 86 Ill. 110-116; *Farrand v. Marshall*, 19 Barb. 381-385; *Selden v. Canal Co.*, 24 Barb. 363-364; *Fletcher v. Rylands*, L. R., 3 H. L. Cas. 330; *Wilson v. New Bedford*, 108 Mass. 261-266; s. c., 11 Am. Rep. 352; *Shipley v. Fifty Associates*, 106 Mass. 194-200; *Ball v. Nye*, 99 Mass. 582-584; s. c., 8 Am. Rep. 318; *Cahill v. Eastman*, 18 Minn. 324; s. c., 10 Am. Rep. 184-200.

The plaintiff, being in possession as the sole devisee under her husband's will and the owner in fee, was entitled to recover as damages a sufficient sum of money to restore her dwelling-house, as far as practicable, to the condition in which it had been prior to the injury inflicted by the defendant's acts. 2 Waterman Trésp., § 1093. We think however that the judgment was excessive, being for \$131.25 more than the verdict of the jury, and therefore should be modified, so as to have judgment rendered for the plaintiff for the sum of \$7,500 and costs.

The case should therefore be remanded to the court below, with directions to modify its judgment in accordance with the views we have herein expressed.

The COURT. For the reasons given in the foregoing opinion, the order denying defendant's motion for a new trial is affirmed, and the cause is remanded to the court below with directions to modify the judgment by striking out the damages thereby awarded and inserting instead thereof the sum of \$7,500. In other respects the judgment is affirmed.

Judgment affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

CROSS v. KITTS.

(89 Cal. 217.)

Water and water-courses — percolation — rights in.

Percolating water, collected and running in a defined channel, is property, the use of which is acquirable by grant or appropriation.*

ACTION to quiet title. The opinion states the case. The defendant had judgment below.

H. V. Reardan, for appellant.

C. W. Kitts, for respondent Kitts.

McKEE, J. This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to quiet title to a water right described in the complaint, and to enjoin the defendant from asserting any title to the water, adverse to the plaintiff.

The judgment was entered upon a decision given in writing, and filed under sections 632 and 633, Code of Civil Procedure. On this appeal from the judgment the plaintiff in the action contends that he was entitled to judgment upon the decision, and that is the question.

According to the decision, J. C. Gillespie was formerly the owner and in possession of a gravel claim, known as the "Gillespie

* To same effect, *Sadler v. Lee* (86 Ga. 45), 42 Am. Rep. 62; *Strait v. Brown* (16 Nev. 317), 40 Am. Rep. 497.

Cross v. Kitts.

claim," which adjoined a gravel claim, known as the "Shanghai claim," situated at the head of Gold Flat, in Nevada county. The Gillespie claim was excavated by a tunnel two hundred feet long, known as the McCormick tunnel, the ground at the entrance of which had caved so that "no water, perceptible upon the surface, issued out of it;" and Gillespie, at or near to its entrance, made an open cut, from the front, bottom and sides of which water percolated and collected "in such quantity as to form a running and defined stream of about two inches, miner's measure." This water came from near the inner end of the tunnel, on or near the dividing line between the Gillespie and the Shanghai claims, and "where the bed-rock pitched down into a low channel or basin."

That was the condition of the Gillespie claim in the year 1864, when Gillespie, being in possession as owner, sold, and by deed transferred to one A. D. Rich, the right to the water issuing from the tunnel in the claim, by the following description:

"That certain spring of water now issuing from the head of an open cut run by said Gillespie in the diggings of said Gillespie. Said diggings being at the head of Gold Flat in Nevada township, Nevada county, State of California, and adjoining the Shanghai diggings on the west, and all waters now issuing or to issue from said spring, with the right and privilege to run another and deeper cut, or a tunnel, or cut and tunnel to said spring, over and through the said diggings of Gillespie, and a right of way and easement to construct said cut or tunnel, and divert, manage and control said water, and make repairs, lay pipes and boxes, and convey and direct said water. The point from which said cut or tunnel is to be run to be the point on Gillespie's diggings where the north-west corner of the said Shanghai diggings touches the diggings of said Gillespie."

When A. D. Rich acquired the water right described in his deed, and J. C. Rich were tenants in common of the Shanghai claim, adjoining the Gillespie claim, and of a parcel of property near to the two claims known as the Half-mile House. There were two springs of water upon the Shanghai claim, and the proprietors of the Half-mile House brought the water from those springs and from the spring issuing from the head of the open cut at the entrance of the tunnel in the Gillespie claim, by means of ditches, boxes and pipes down to their property for domestic use and irrigation; and in that manner they continued to use and enjoy the

water from those sources until the year 1872, when they sold and conveyed the Half-mile House property to one G. M. Smith. The finding of the court is:

"That said Half-mile House was by J. C. and A. D. Rich sold to G. W. Smith in 1872, and in the deed conveying the same several water rights were described, and among them the following: 'Also that certain other water right, situate in said township and county, consisting of a spring and the waters arising therefrom, situate and being upon the Shanghai mining claim, formerly owned by Prior and Madison, on Gold Flat, in the ranch of Gillespie, together with all flumes and ditches used to divert and convey the waters of said spring to the lot and premises herein first conveyed.'

"And all the water rights mentioned in the respective deeds from Rich and Rich to Smith * * * were likewise used at and appurtenant to said Half-mile House property, at the time of the conveyance thereof to Smith."

As administrator of the estate of T. W. Sigourney, deceased, the plaintiff in the action derives title to the Half-mile House property by mesne conveyances from Smith and A. D. and J. C. Rich. Sigourney died in 1880, seised and possessed of the property. From the year 1873, the date of his acquisition of title, until the time of his death, he occupied the property, and used and enjoyed the water appurtenant to it, to the same extent that his grantors, immediate and remote, had used and enjoyed it, except that some changes were made in the use, necessitated by the working of the gravel claims in which the springs were located; but the right of Sigourney to the water from the McCormick tunnel in the Gillespie gravel claim was never questioned in his life-time. In fact, it was always admitted by the owners and workers of the claim.

But in the year 1881, Kitts, defendant in the action, acquired the title of the Gillespie gravel claim, and in working the claim by the hydraulic process, they mined away a portion of the McCormick tunnel, and stopped the waters from flowing into and through the Sigourney flume to the Half-mile House property, claiming that the water in the tunnel was their property.

The court decided in favor of defendants holding as matter of law, "that neither the plaintiff nor the plaintiff's intestate ever had or now has any estate, right, title, or interest whatever in the said * * * mining claims, and the said plaintiff does not now have, and did not have at the time of the commencement of this

Cross v. Kitts.

action, any right, title, or interest whatever in any water or water right therein or thereon, or the right to take water flowing therefrom. And that said defendants * * * are the sole owners of all waters flowing from said mining claim, and are entitled to the use and possession thereof.

“That they have the right to mine and work their said claims, and to divert, appropriate, and use all water that may be found therein that may flow therefrom.”

The conclusion that the plaintiff had no right in or to receive the water flowing from the McCormick tunnel is not well drawn from the findings. The right in and the right of receiving the water (Civil Code, § 810) passed by the deed of Gillespie in 1864 to A. D. Rich, and all the actual title to the Half-mile House property passed from A. D. and J. C. Rich and their grantees by the mesne conveyance under which Sigourney derived the title. The right to the water from the McCormick tunnel therefore passed as an incident to the Half-mile House property. Civil Code, § 1084; *Sparks v. Hess*, 15 Cal. 186; *Cave v. Crafts*, 53 Cal. 135. A transfer of real property, says the code, passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred for the benefit thereof, at the time when the transfer was agreed upon or completed. Civil Code, § 1104.

But the decision that the defendants as owners of the Gillespie gravel claim had the superior right to the water seems to have for its basis the fact found by the court, “that all the water that ever flowed through the McCormick tunnel was percolating water gathered from the ground through which said tunnel was run”; but the court also found as a fact that the water “percolated and collected in such quantity as to form a running and defined stream of about two inches, miner’s measure.”

There is no doubt the percolating water existing in the earth is not governed by the same laws that pertain to running streams. Water percolating in the soil belongs to the owner of the freehold. “Each owner,” says the Supreme Court of Connecticut, “has an equal and complete right to the use of his land and to the water which is in it. Water combined with the earth, or passing through it, by percolation or filtration or chemical attraction, has no distinctive

Durkee v. Central Pacific Railroad Company.

character of ownership from the earth itself any more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth." *Roath v. Driscoll*, 20 Conn. 540; s. c., 52 Am. Dec. 352. See also *Hanson v. McCus*, 42 Cal. 303; *Ballard v. Tomlinson*, 24 Am. Law Reg. 636; 26 Chy. Div. 194.

But where percolating waters collect or are gathered in a stream running in a defined channel, no distinction exists between waters so running under the surface or upon the surface of land. They are such property or incidents to property as may be acquired by grant, express or implied, or by appropriation, and when rights in them are thus acquired, the owner cannot be divested of his rights by the wrongful acts of another. In *Brown v. Ashley*, 16 Nev. 317, it was held that rights in water coming from a spring by percolation are acquirable by prior appropriation, and the appropriator cannot be divested of them by a subsequent owner of the soil, and *a fortiori* will that be the case where such rights are derived from the owner of the soil by express grant.

The plaintiff was entitled to judgment upon the findings.

Rehearing denied.

Judgment reversed and cause remanded.

MYRICK, SHARPSTEIN, and MCKINSTRY, JJ., concurred.

DURKEE V. CENTRAL PACIFIC RAILROAD COMPANY.

(69 Cal. 533.)

Evidence — declarations — of agent — res gesta.

In an action for an injury by a railway accident, declarations of the locomotive engineer in charge of the train, to whose negligence the accident is attributed, made five minutes afterward, are incompetent as evidence. (See note, p. 565.)

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

McAllister & Bergen, and *W. C. Belcher*, for appellant.

H. F. Crane, and *D. M. Delmas*, for respondent.

Durkee v. Central Pacific Railroad Company.

MYRICK, J. Action for damages for injuries received by the plaintiff in being run over by a locomotive of the defendant. There was no question as to the plaintiff having been injured. The only questions were as to negligence of the engineer of the defendant, and as to contributory negligence on the part of the father of the plaintiff, the plaintiff being at the time of the injury an infant of the age of about four and a half years.

The train of cars had halted, as usual, at a station (being on time), and the engineer received from the conductor the usual signal to start. Immediately in front of the engine was a trestle and bridge, just beyond which a country road, leading to the house of plaintiff's father, crossed the track. The child was injured at a point at or near where the trestle joins the hard ground.

The engineer testified that on receiving the signal to go ahead, and on starting, he looked along the track and saw nothing out of the way, but after he was under way he saw the head of the child raised from between the timbers, when he instantly reversed the engine and whistled for brakes, but too late.

A witness for the plaintiff testified he was some distance away, managing a pair of fractious horses, and that at the moment the train started he saw the child standing on the track, throwing its hands as if "daring the engine."

It is barely necessary to say there is no pretense that the engineer saw the child in time to avoid the occurrence; but it is claimed he should have seen him, and that his failure to see him was from negligence.

For the purpose of showing negligence on the part of the engineer, a witness was permitted to testify as to declarations made by the engineer; and the ruling of the court in admitting the testimony of this witness is claimed to be error.

As soon as the train was stopped, the conductor and brakeman removed the child from under the tender, and found that its feet were injured; they did not know whose child it was, but started to carry him to a house near by, about a quarter of a mile; when near the house the witness met them, and told them whose child he was, and that the father lived at some distance on the other side of the track; the witness went to the engine, which he reached some few minutes after the occurrence, he thought about five minutes; he there met the engineer and fireman, and asked them how it occurred; the witness, against the objections of the defendant,

Durkee v. Central Pacific Railroad Company.

was permitted to give the reply of the engineer to this question; he testified that the engineer stated to him that when he started up the train, he was looking up toward Peacock's (a house on the right hand side of the road) to see if any one was coming down, and when he turned around he saw the boy and blew the whistle, but when he reversed the engine it was too late. This evidence was claimed to be competent and proper, as a part of the *res gestæ*.

We are of opinion that the declaration was not a part of the *res gestæ*, and that the court erred in admitting it. It is said, in 1 Greenl. Ev., § 113, referring to the declarations of an agent that "wherever what he did is admissible in evidence, then it is competent to prove what he said about the act while he was doing it"; and the editor to the addition of 1866 has inserted, immediately following the above: "The declaration of the driver of a car after the car had stopped, assigning the reason why he did not stop the car, and thus prevent the injury to plaintiff while crossing the street, that he could not stop the car because the brakes were out of order, being made after the injury was inflicted and the transaction terminated, is not admissible against the company in whose employ such driver was, it being mere hearsay"; citing *Luby v. H. R. R. Co.*, 17 N. Y. 131; and the editor remarks in a note that a case holding the declarations of an agent after the event admissible is certainly not maintainable upon general principles. So says the same editor, in section 114: "The declarations of the conductor of a railway train as to the mode in which an accident occurred, made after its occurrence, or those of an engineer made under similar circumstances, are not admissible."

In the case before us, the occurrence had taken place, the child had been removed from under the tender carried away nearly a quarter of a mile, and brought back on the way to the father's house, before the declaration was made. This evidence was material, as tending to show that the engineer was not giving proper attention to his duties.

For the error in admitting in evidence the declaration of the engineer, the judgment and order are reversed, and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

McKINSTRY, ROSS, THORNTON, and SHARPSTEIN, JJ., concurred.

Durkee v. Central Pacific Railroad Company.

NOTE BY THE REPORTER. — In *Vicksburg & M. R. Co. v. O'Brien*, U. S. Supreme Court, Nov. 1886, it was held as follows: In an action against a railroad company to recover damages for injuries received by a passenger on a train, a declaration of the engineer, made between ten and thirty minutes after the accident occurred, as to the rate at which the train was going at the time, is not admissible in behalf of the plaintiff. The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence; "being" says Phillips, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381. "But it must be remembered," says Greenleaf, "that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending *et dum ferret opus*. It is because it is a verbal act, and part of the *res gesta*, that it is admissible at all; and therefore it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it." 1 Greenl. Ev., § 113. This court had occasion in *Packet Co. v. Clough*, 20 Wall. 546, to consider this question. Referring to the rule as stated by Mr. Justice STORY in his Treatise on Agency, § 134, that "where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gesta*," the court, speaking by Justice STORY, said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gesta*." We are of opinion that the declaration of the engineer, Herbert, to the witness Roach, was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true, that in view of the engineer's experience and position, his statements under oath as a witness in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was in some degree subject to his control, still his authority in that respect did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a completed fact, and when he was not performing the duties of an engineer, that the train at the moment the plaintiff was injured was being run at the rate of eighteen miles an hour, was not explanatory of any thing is

Durkee v. Central Pacific Railroad Company.

which he was then engaged. It did not accompany the act from which the injuries in question arose. In was, in its essence, the mere narration of a past occurrence, not a part of the *res gesta*—simply an assertion or representation in the course of conversation as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gesta* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing any thing that could possibly affect it. If this declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes, an appreciable period of time, after the accident, cannot upon principle make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gesta*, without calling him as a witness, a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the States. WATTE, C. J., FIELD, MILLER and BLATCHFORD, JJ., dissenting.

See also 36 Am. Rep. 825, and note; 41 Am. Rep. 17, 333; 47 Am. Rep. 53; 48 Am. Rep. 196; 39 Am. Rep. 526; 53 Am. Rep. 364, 838; 55 Am. Rep. 686.

In *Williamson v. Cambridge R. Co.*, Mass. Sup. Judicial Court, Feb. 26, 1887, declarations of a street car conductor, immediately after the accident, that he was very sorry and that it was his fault, held, inadmissible. On the authority of *Lane v. Bryant*, 9 Gray, 245, it was said, "it was only the expression of an opinion about a past occurrence, and not part of the *res gesta*. It is no more competent because made immediately after the accident than if made a week or a month afterward." "The words of the conductor did not form part of that transaction, or in any manner qualify his act, or any act of the plaintiff. They were in form and substance narrative, and expressed an opinion upon a past transaction." The words "did not enter into and give it character, any more than would the declaration of the conductor that he had not been in fault, or that the plaintiff had been."

In *Little Rock, etc., Ry. Co. v. Leverett*, Ark. Sup. Ct., Feb. 5, 1887, it was held that the declarations of a switchman, made immediately after an accident by which he has been knocked down and run over, and while he is still under the car, touching the cause of the accident, are competent, as part of the *res gesta*. The court said: "In *Com. v. Hackett*, 2 Allen, 186, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out, 'I am stabbed,' and he at once went to him and reached him within twenty seconds after that, and then heard him say: 'I am stabbed; I am gone. Dave Hackett has stabbed me.' This evidence was held competent as a part of the *res gesta*. * * * In the case of *Hanover R. Co. v. Coyle*, 55 Penn. St. 403, where a peddler's wagon was struck, and the peddler injured by the negligence of the engineer, the latter's declaration, made after

Durkee v. Central Pacific Railroad Company.

the infliction of the injury, was admitted as a part of the transaction itself; the court saying: 'We cannot say that the declaration was no part of the *res gesta*. It was made at the time, in view of the goods strown along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself.' In the case of *Elkins v. McKean*, 79 Penn. St. 498, the plaintiff sued the defendant for damages caused by oil, manufactured and sold by him to plaintiff's husband, exploding while the husband was using it in a lamp, and catching fire, and burning the husband to death. The court held what the husband said as to the cause of the accident, when found enveloped in the flames, or within a few minutes afterward, was clearly competent evidence as a part of the *res gesta*. In *Casey v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 518, the plaintiff sued for damages resulting from the death of a child who had been run over and killed by the defendant's cars. On the trial a police officer, who went to the place of the accident immediately after the child was killed, and found the child under the wheels of the car, was permitted, as a witness for the plaintiff, to state what the engineer in charge of the engine said and did in extricating the body of the child from under the wheels of the car. The court held the statements of the engineer were admissible as a part of the *res gesta*. *Walden v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 284; s. c., 47 Am. Rep. 41. *McLeod v. Ginther's Adm'r*, 80 Ky. 899, was a suit for damages resulting from the willful neglect of appellant's servants in sending dispatches to two conductors of trains which were to run on the same day over the same part of defendant's road. The dispatches were alike, and ambiguous, and construed differently by the two conductors. The result was a collision of trains, and the death of Ginther, plaintiff's intestate, who was an engineer on one of the trains. Fish, the conductor on the same train, within a few seconds after the casualty, remarked to the engineer of the other train, 'I had until 10:10 to make Beards.' It was held by the court that it was important to show what Fish and Ginther thought of the meaning of the dispatch while they were acting under it, as the negligence in this case consisted of the wording of the dispatch so as to mislead them, and that the declaration of Fish having been made within a few seconds after the accident, in view of the wrecked trains, and amidst the search for persons whose fate was then unknown, and while Ginther, who lived but thirty minutes, was dying from the injuries he had received, was admissible for that purpose as a part of the *res gesta*. * * * The statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gesta*, and fairly goes to explain the cause of the condition in which he was at the time it was made. It was an emanation of the act in question, and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy."

In *Jones v. State*, Tex. Ct. App., Nov. 17, 1886, declarations of the accused made fifteen or twenty minutes after the occurrence, *held*, inadmissible.

Kalis v. Shattuck.

In *Smith v. St. Louis, etc., Ry. Co.*, Mo. Sup. Ct., Feb. 1887, declarations by a section foreman as to the fact of killing stock, made after the event, *held*, inadmissible.

In *McDermott v. Hannibal and St. Jo. R. Co.*, Mo. Sup. Ct., June, 1886, the point in question was the incompetency of Dawson, a co-servant of plaintiff, and the declaration of Goodwin, the road-master, that "Dawson is not a good railroad man any way, but I wanted to give him a chance," was held inadmissible to prove the fact of incompetency, although admissible to prove notice to the defendant of the alleged fact.

In *Cleveland v. Newsome*, 45 Mich. 62, a boy drove against a foot passenger "in a street, immediately stopped, came back and said he did not mean to, *held*, admissible. It was as much a part of the *res gesta* as would have been an exclamation at the very instant the plaintiff was struck."

In *Pfeffele v. Sec. Ave. R. Co.*, 19 Week. Dig. 44, it was held that declarations of a car driver, immediately after a collision, that he could not help it, because the brake was broken, were inadmissible.

In *Bradberry v. State*, Tex. Ct. App., Nov. 18, 1886, the accused offered to prove his declarations to a witness who was 200 yards distant when the crime occurred, but who came immediately to the place, and to whom they were made within three minutes. *Held*, inadmissible.

In *State v. Estoup*, La. Sup. Ct., Feb., 1887, declarations by a wounded man, ten minutes after the affray, and seventy yards from the place, *held*, inadmissible.

In *Martin v. N. Y., etc., R. Co.*, 103 N. Y. 626, declarations of the injured party, while being conveyed from the scene to the switch-house, *held*, inadmissible, on the authority of the *Waldele* case, 95 N. Y. 274; s. c., 47 Am. Rep. 41.

KALIS V. SHATTUCK.

(69 Cal. 588.)

Landlord and tenant — nuisance — awning.

A landlord of premises in exclusive possession and control of a tenant, is not liable to a third person for injury by the fall of an awning intended solely as a protection against sun and rain, the fall having been occasioned by the tenant's negligent conduct in permitting a crowd of people to stand upon it.*

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

* See *Cole v. McKay* (86 Wis. 500), 57 Am. Rep. 293; *Calder v. Smalley* (66 Iowa, 219), 55 Am. Rep. 270; *Edwards v. N. Y., etc., R. Co.* (98 N. Y. 245), 50 Am. Rep. 659.

Kalis v. Shattuck.

J. C. Martin, Moore & Reed, and Sidney V. Smith & Son, for appellants.

J. B. Lamar and J. E. Foulds, for respondents.

MCKEE, J. Pauline Kalis, the wife of her co-plaintiff, while passing along the sidewalk in front of a building on the west side of Broadway, in the city of Oakland, received personal injuries from the fall of a wooden awning, which extended, with a slanting direction, from the second story of the building for about twenty feet over the sidewalk; and to recover damages for the injuries sustained, she brought the action in hand against "F. K. Shattuck, Maria Hillegas (administratrix of the estate of William Hillegas, deceased)," and seven other defendants, "for knowingly, negligently, and carelessly suffering the awning to remain rotten and insufficiently supported," in consequence of which, and of the "negligence and carelessness of the defendants in maintaining and using it in that defective condition," it fell upon the plaintiff while lawfully passing on the sidewalk, and inflicted upon her painful and permanent injuries.

On the trial of the case nonsuits were granted in favor of all the defendants except Shattuck and Maria Hillegas; against them a verdict and judgment for \$3,000 were rendered, and from the judgment and an order denying their motion for a new trial they have appealed.

The statement of the case upon which the motion was heard and decided shows that the awning was constructed "about twelve years ago," by F. K. Shattuck and William Hillegas, who were owners of the building. Hillegas, being a tenant in common of the building, died in 1876. As constructed, the awning consisted of a piece of two-by-twelve-inch timber bolted to the brick wall of the building with bolts which were bedded in the wall. From this, timber rafters, two inches by twelve inches, extended every twelve feet from the wall over the sidewalk, and were supported by turned posts, in front of which, and to receive the ends of the rafters, a piece of timber three inches by twelve inches was halved on the upper part of the posts, and spiked to them and to the rafters. Between the rafters there was laid a two-by-six-inch cross-rafter, which supported the awning covering, made from one-by-six-inch tongued and grooved boards. The awning had a pitch of

twelve inches. There was no railing in connection with it; no doors or steps leading to it. The sole purpose of its construction was as a cover for the sidewalk from sunshine and rain.

The awning fell and injured the plaintiff on the 9th of September, 1880. As to the condition of the posts that supported it on that day there was a conflict in the evidence. But the evidence given on the part of both plaintiff and defendants tended to show that the awning fell, not from any inherent defect in its original construction, or from an unsound condition which rendered it unfit for the ordinary use for which it was constructed, but from an unreasonable and improper use of it for a purpose for which it was not constructed. For the uncontroverted facts are: That a great number of people were crowded upon it to witness the march of a public procession through Broadway; and they got on to the awning through a hall in the second story of the building to which it was attached. The hall was then occupied and controlled by a political club to whom it had been rented, and the janitor of the club permitted the public to go through the hall and out of the windows on to the awning, taking with them the chairs and benches of the hall. The lower story of the building was also at the time rented to different tenants in possession.

The exact time when the premises were demised to the tenants in possession does not appear. The only evidence upon the question is the following by the defendant Shattuck: "Previous to the 9th of September, 1880, I leased the hall to the Republican Central Club of Oakland. From July to November, 1880, I had no control over the hall in any way whatever."

Nor is it made to appear by any evidence what was the condition of the awning at the time the building or any part of it was let to the tenants. The sole ground upon which the verdict and judgment seems to be founded is that the relation of landlord and tenant existed between the appellants and the occupants of the building, and that it was the duty of the landlords to prevent the fall of the awning, although the building was in possession of their tenants at the time. Therefore it is contended that they, as owners and landlords, are liable to the plaintiff for the consequences resulting to her from the fall of the awning.

But there is no proof that Maria Hillegas had any connection with the construction of the awning, or leased any part of the building, or claimed that those in possession were her tenants, or

Kalis v. Shattuck.

received any rent from any of them. In the complaint she is described as the administratrix of the estate of William Hillegas, deceased, who, in his life-time, was co-owner with the defendant Shattuck of the building. But as she had no connection with the construction of the awning, had not demised any part of the building, never claimed that the persons occupying it were her tenants or received any rents from them, she cannot be said to have made herself, as administratrix or otherwise, in any way responsible for the continuance of the awning, even if it was a nuisance, or for the consequences to the plaintiff from its breaking down. As to her the verdict and judgment are therefore unsustained by the evidence. *Oakham v. Holbrook*, 11 Cush. 303.

As to the defendant Shattuck the only question is, whether as owner and landlord of the building, he is liable for the consequences to the plaintiff of a nuisance in connection with the building in the possession and control of his tenants.

It is well settled that a landlord is not liable for such consequences, unless, 1, The nuisance occasioning the injury existed at the time the premises were demised; or 2, The structure was in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it. *Jessen v. Sweigert*, 66 Cal. 182; *Rector v. Buckhart*, 3 Hill, 193; *Mullen v. St. John*, 57 N. Y. 567; s. c., 15 Am. Rep. 530; *Hussey v. Ryan*, 64 Md. 426; s. c., 54 Am. Rep. 772; *Wood Nuis.*, §§ 295, 676; *Wood Landl. and Ten.* 918. Or 3, the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury.

The rule of law on the subject is thus stated by the English courts: "To bring liability home to the owner of real property," says CROMPTON, J., in *Gandy v. Jubber*, 5 Best & S. 73, 485, "the nuisance must be one which is in its very essence and nature a nuisance at the time of the letting, and not something which is capable of being thereafter rendered a nuisance by the tenant." "The nuisance," says BLACKBURN, J., in the same case, "must be, if I may so term it, a normal one." To the same effect will be found the law in cases in the courts of the United States.

In *Ourings v. Jones*, 9 Ind. 108, the defendant, a landlord, was held liable to the plaintiff for the consequences of an unlawful act, in the original construction of the sidewalk in front of the build-

ing, committed by him before he demised the building. The unlawful act was the making of a hole in the sidewalk, which he covered with a sufficient grating, but without obtaining the requisite license from the city authorities. The plaintiff fell through the hole and was injured, and the court held, that although the premises were at the time of the accident in the possession of the defendant's tenant, the defendant was liable for the consequences of his unlawful act; and while it is true, says the court, if property not then a nuisance is demised, but becomes so only by the act of the tenant, the landlord is not liable, yet where the owner leases premises which are a nuisance, or must in the nature of things become so from their user, and receives rent, he is liable. On like ground, in *Bellows v. Sackett*, 15 Barb. 96, a landlord was held liable for injury from the drip from a roof built of defective materials, where the injury arose from the ordinary user of the premises. And in *Godley v. Hagerty*, 20 Penn. St. 387; s. c., 59 Am. Dec. 731, and *Carson v. Godley*, 26 Penn. St. 111; s. c., 67 Am. Dec. 404, a landlord was held liable for injuries from the fall of buildings defectively constructed for storage, for which purpose they had been let to tenants in possession. The liability of the owner was made to turn upon the question: "Did the landlord permit the buildings to pass from his possession deficient in some particular essential to their future safety, when reasonably used in the business and for the purposes for which they were constructed?" It was admitted that if a building constructed with ordinary care falls from the tenant's misuse, or if the tenant had ordered the construction, inspected and accepted it, then he alone would be liable for injuries from its fall. "But," say the court, "if the catastrophe results from occult defect, * * * as if the materials be inferior, etc., the landlord, and not the tenant, would be liable * * * The wrong consisted * * * in building and renting a store for a specific purpose, for which it was unfit."

So in *Swords v. Edgar*, 59 N. Y. 28; s. c., 17 Am. Rep. 295. a lessor was held liable for injuries to a third person, caused by the fall of a wharf, which was unsafe and defective at the time he leased it, although it was in the possession of the tenant at the time of the accident.

But it is maintained that whatever may have been the time of the demise to the tenants in possession, the awning was a nuisance *per se*, because it was constructed over the sidewalk without license

Kalis v. Shattuck.

or leave of the corporate authorities, and without the sanction of the legislature. Dill. Mun. Corp., § 521; Wood Nuis., § 502.

That however is the assumption of a fact which nowhere appears in the case. No such issue was raised by the pleadings or proved at the trial. The complaint contains no allegation which expresses, or from which it could be implied, that the awning was constructed without license or authority; on the contrary, seemingly assuming that it had been lawfully constructed, liability for the injuries occasioned by its fall was sought to be enforced against the defendants on the sole ground of negligence on their part in suffering it to be in such an unsound and unsafe condition that it fell and injured the plaintiff. To the maintenance of that allegation, as the ground of her cause of action, all the evidence given for the plaintiff was directed. We must therefore presume that those who constructed the awning acted under authority of law.

Yet even upon that assumption, the law would impose upon them the obligation to keep in repair what they were authorized to erect and maintain; and if they by neglect unskillfully constructed it or negligently maintained it, so that it was or became a nuisance, they would be answerable *civiliter* in damages to a person injured by their neglect to perform their obligation to properly erect and sufficiently maintain it. It was upon that principle that the plaintiff's cause of action was founded and tried.

But there was no such cause of action made out against the appellants; for there was no evidence that the awning was defectively constructed, or that it was in such a condition at the time of the demise of the building that it constituted a nuisance, or would be likely to become such in the ordinary uses for the purposes for which the awning was constructed. On the contrary, it was shown by evidence, in which there was no substantial conflict, that the fall of the awning was attributable to an improper and negligent use of the awning by the tenant. It did not fall in consequence of the negligence of the owner to keep in repair, as in the cases of *Jessen v. Sweigert*, 66 Cal. 182, and *Burke v. Schwerdt*, 5 W. C. Rep. 880. It would not have fallen, if it had not been for the people that crowded upon it, by the permission of the tenant. It broke down because subjected to a weight too heavy for it to bear. Permitting it to be used in that way was the wrongful act which made of it a nuisance; and as a nuisance it was created by the tenant, and the tenant alone is liable; the landlord is not, unless he is

Hollis v. Meux.

shown to have participated in the wrongful act by authorizing or permitting it to be done. "A landlord," says the Supreme Court of Massachusetts, "is not responsible to other parties for the misconduct or injurious acts of his tenants to whom his estate has been leased for a lawful and proper purpose, when there was no nuisance or illegal structure upon it at the time of the lease." *Saltoual v. Baker*, 8 Gray, 195. See also *Mellen v. Morril*, 127 Mass. 545; *Leonard v. Storer*, 115 Mass. 86; s. c., 15 Am. Rep. 76; *Wood Nuis.* 79, 80, 142.

Judgment and order reversed, and cause remanded for a new trial.

Judgment reversed and cause remanded.

MORRISON, C. J., ROSS, MYRICK, SHARPSTEIN and MCKINSTRY, J.J., concurred.

HOLLIS v. MEUX.

(80 Cal. 625.)

Libel — attorney — privileged communication.

An attorney who files specifications of opposition to an insolvent's discharge, alleging that the insolvent had been privy to false and fraudulent entries in his books, had sworn falsely in relation to his estate, and in a fiduciary capacity had fraudulently converted property to his own use, which information he had derived from his client, is not liable for libel.

LIBEL. The facts are stated in the opinion. The defendant had judgment below.

W. H. Fifield, for appellant.

Arthur Rodgers and Saffold & Meux, for respondent.

MCKEE, J. A demurrer was sustained to the complaint in this case, on the ground that it did not contain facts sufficient to constitute a cause of action. The plaintiff declined to amend; judgment was entered against him, and from the judgment this appeal is taken.

The object of the action was to recover damages for a libel.

On the face of the complaint it appears that the plaintiff had filed in the Superior Court of the city and county of San Francisco his voluntary petition in insolvency, to be discharged from his debts

Hollis v. Meux.

and liabilities as an insolvent debtor under the insolvency law; that a corporation existed which was known as "The Real Estate and Building Association"; that there was another corporation known as "The Real Estate Associates," of which plaintiff was the president and business manager; that the last-named corporation had proven a claim against the estate of the insolvent debtor, and opposed his discharge; that in connection with the claim the defendant acted as attorney for the corporation creditor on the occasion of filing its opposition to the discharge of the debtor, and that in the specifications of opposition which were filed, the defendant maliciously published concerning the plaintiff certain false and scandalous matters, with intent to impute to him the crimes of embezzlement and perjury.

Under the insolvent law, "any creditor" is authorized to oppose the discharge of a debtor by filing specifications in writing of the grounds of his opposition, and the law provides that "no discharge shall be granted, * * * if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, inventory, * *

* in relation to any material fact concerning his estate or his debts, or to any other material fact, * * * or if * * * he has been guilty of fraud contrary to the true intent of this act," etc. Ins. Act of 1880, § 49. The law also provides: "No debt created by fraud or embezzlement of the debtor, * * * or while acting in a fiduciary character, shall be discharged." Ins. Act of 1880, § 52.

The grounds set forth in the specifications are:

1. That the insolvent debtor had been privy to the making of a false and fraudulent entry upon the books of the Real Estate and Building Association, with the intent to defraud his creditors.

2. That he swore falsely upon an examination in the course of the proceedings in insolvency in relation to a material fact concerning his estate and indebtedness.

3. That the indebtedness of the debtor to the Real Estate Association was created by him while acting in a fiduciary capacity; namely, as its president, director, manager, and trustee; and

4. That while acting in such capacity he fraudulently converted to his own use a large amount of real and personal property of the said corporation.

Upon these grounds the creditor opposed the discharge of the debtor; and as the specifications were prepared and filed under the insolvent law by the defendant as the attorney of the opposing

creditor, in the course of the judicial proceedings commenced to obtain his discharge, it is claimed that their publication was privileged.

“A privileged publication is one made:

“1. In the proper discharge of an official duty;

“2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law;

“3. In a communication without malice to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;

“4. By a fair and true report, without malice of a judicial, legislative or other public official proceeding, or of any thing said in the course thereof.” Civil Code, § 47.

In *Kidder v. Parkhurst*, 3 Allen, 393, where a libel was alleged to have been published on the occasion of presenting a complaint to a grand jury, it is said: “The complaint appears to have been made in the regular course of justice, and the decisions, ancient and modern, are uniform, that no proceeding in a regular course of justice is to be deemed an actionable libel. * * * In *Hill v. Miles*, 9 N. H. 14, it was said by PARKER, C. J., that an action for a libel cannot be sustained for a proceeding before a court having jurisdiction of the subject-matter if the process was instituted under a probable belief that the matter alleged was true, and with the intention of pursuing it according to the course of the court, even if the matter turns out to be wholly false.”

The rule of the English law is, that such a publication is absolutely privileged. That is to say, that a defamatory statement made by writing, or in words, in the course of an inquiry regarding the administration of the law is privileged whether it was or not made in bad faith, or was or not relevant to the inquiry. Thus, in an action brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as advocate for a person charged in a court with an offense against the law, the Court of Appeal, on appeal from a judgment of the Court of Queen's Bench, held that the action was not maintainable. “No action of any kind,” says the court, “will lie for words spoken in a course of law, even if they were spoken from an indirect motive and to gratify malice.”

Hollis v. Meux.

"This rule," it adds, "is founded upon public policy which requires that a judge, in dealing with the matter before him, counsel, in preferring or resisting a legal proceeding, and a witness, in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. The question of malice, *bona fides*, and relevancy cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of law. If that be so, the case against a counsel must be stopped at once." *Munster v. Lamb*, 23 Am. Law Reg. 12; 11 Q. B. Div. 588

The rule is not carried to that extent by the American courts. Generally, a privileged publication is conditional or limited, and not absolute.

Says Chief Justice GRAY, in delivering the opinion of the court in *Hoar v. Wood*, 3 Metc. 198: "The privilege is limited by this, that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which has no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes and advocating and sustaining the rights of their constituents."

So in *Gilbert v. People*, 1 Denio, 45; s. c., 43 Am. Dec. 646, BEARDSLAY, J., says: "Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor, or counsel therein, if pertinent and material to the matter in controversy, is privileged, and consequently lays no foundation for a private action or a public prosecution. The general language of elementary writers is that whatever occurs in the regular course of justice is privileged (1 Hawk. P. C., chap. 73, § 8; 3 Chit. Crim. Law, 869; 1 Saund. 131 [1]; 1 Russ. on Crimes, 307; Bac. Abr., tit. Libel, A, 4), and by which they intend to indicate the practice I have stated. If what is said or written is pertinent and material to the controversy, the protection to the parties and those who represent them (for all stand on the same ground) is absolute and unqualified, and no one shall be permitted to allege that it was done with malice. But this is the extent of the privilege; for if a party or his agent will pass beyond the prescribed limit to asperse and vilify another by word or writing, he is without protection; and as in

other cases, must abide the consequences of his own misconduct. If slanderous words are used he is a slanderer, and if he offends in writing he is a libeller, and may be prosecuted both civilly and criminally as such. *Hastings v. Lusk*, 22 Wend. 410; s. c., 34 Am. Dec. 330; *Hodgson v. Scarlet*, 1 Barn. & Ald. 232; *Ring v. Wheeler*, 7 Cow. 725; *Thorn v. Blanchard*, 5 Johns. 508."

And in *Wyatt v. Buell*, 47 Cal. 624, where it appeared that the occasion of an application to this court for an extension of time to file a transcript on an appeal was availed of to publish in the petition, filed for that purpose, scandalous matters which were wholly foreign to the application, this court held that the publication was not privileged.

Whether the legislature intended to change the rule as announced in *Wyatt v. Buell*, by the amendment of section 47 of the Civil Code, which took effect on the 1st of July, 1874, is not necessary to be determined. For in the view that we take of the case as presented by the complaint, the words, written in the course of plaintiff's proceedings in insolvency, though they were such as imputed to the plaintiff crimes, and if spoken elsewhere would import malice and be actionable, are not actionable under either an absolute or conditional rule of privilege.

If the publication was absolutely privileged, the action was not maintainable. If it was conditionally privileged, then the only question arising upon the complaint is reducible to this: Does it appear by the complaint that the grounds of opposition as published in the specifications, to the discharge of the plaintiff as an insolvent debtor, were pertinent and material to the cause or subject of inquiry before the court in which the specifications were filed?

We think the question must be answered in the affirmative.

The question to be tried was whether the plaintiff was entitled to be discharged from his debts under the insolvent law. The matter contained in the specifications of opposition had certainly a bearing upon the question. If the defendant, in the course of his employment as attorney for his client, was informed that the plaintiff acted in a fiduciary capacity, or committed the acts of fraud, as charged in the specifications, in contracting any of the debts for which he became insolvent, it was his duty, in resisting for his client, as an opposing creditor, the application of the debtor, to publish the facts. Their publication on the occasion was absolutely privileged. Malice cannot be predicated of it. No one

Hollis v. Meux.

is permitted to allege that what was rightly done in a judicial proceeding was done with malice. *Warner v. Payne*, 2 Sand. 210; *Suydam v. Moffatt*, 1 Sand. 462; *Garr v. Selden*, 4 N. Y. 94.

Judgment affirmed.

MORRISON, C. J., THORNTON, ROSS, SHARPSTEIN, and McKINSTRY, JJ., concurrd.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

HINES V. DUNCAN.

(79 Ala. 112.)

Homestead exemption — married woman's claim.

A bill in equity to subject a married woman's equitable estate to a debt created by contract creates a lien, from the service of process, which is superior to a claim of homestead exemption subsequently created.

BILL to subject lands to a contract debt. The opinion states the case. The defendant had judgment below.

G. L. Smith, for appellant.

Cloud & Cloud, and *L. H. Faith*, contra.

CLOPTON, J. Statutes conferring on a debtor the right to exemption of property from sale for the payment of debts have been generally regarded as founded in a humane and enlightened policy, having respect to the common welfare, as well as to the benefit of the individual debtor. Their obvious purpose is to secure to each family a home and means of livelihood, irrespective of financial misfortune, and beyond the reach of creditors; security of the State from the burden of pauperism, and of the individual citizen from destitution. Such statutes are entitled to a liberal construction, a

Hines v. Duncan.

construction in conformity with the benevolent spirit which moved their enactment. Whilst the language of the statute is "shall be exempted from levy and sale under execution, or other process for the collection of debts," a formal, technical process is not requisite. The exemption is, in spirit and substantially, from the payment of debts; and the property is exempt from sale by either process of law or in equity, the subject of which is its appropriation to the payment of debts. The homestead of a married woman, being her equitable separate estate, is exempt from condemnation, by decree in equity, to pay her debts, if the claim is interposed in proper time and mode. *Weiner v. Sterling*, 61 Ala. 98. Notwithstanding such statutes are entitled to a liberal construction, it should not be so liberal as to depart from the plain and obvious meaning of the words used, or to dispense with the necessity of parties bringing themselves within their provisions, without being supplemented or extended by judicial construction.

By statute, any lot in the city, town or village, not exceeding \$2,000 in value, with the dwelling and appurtenances thereon, owned and occupied by any resident of this State, or if the same cannot be allotted, then \$2,000 of the value thereof, is exempt from the payment of debts contracted after April 23d, 1873. If the claim of the exemption of the homestead is not asserted before a sale thereof, it is considered as waived; but by our uniform decisions, it may be successfully interposed at any time before a sale, or an order of sale. *Simpson v. Simpson*, 30 Ala. 225; *Sherry v. Brown*, 66 Ala. 51. If there existed the right to a homestead exemption as against the demand of appellant, it was claimed in due time.

The bill is brought by appellant to subject a lot of land, situate in the port of Mobile, which is the equitable separate estate of Mrs. Duncan, to the payment of a note made by her, February 27, 1883, to appellant's intestate. At the time of the filing of the original bill, and of the service of process, neither Mrs. Duncan nor her husband was in the actual occupancy of the lot, and had not been for twelve months previously; but some days after the service of process, they moved into the dwelling-house thereon, occupied, selected, and claimed the land as a homestead, and as exempt from the payment of the note. The right to a homestead exemption is dependent and determinant on the state of facts as they existed at the time the lien of the process attached; and if the right does not

exist at this time, it cannot be created by any subsequent act of the debtor. To be available, there must be a present right of exemption, when the creditor acquires a lien otherwise it is subordinate thereto. *Scaife v. Argall*, 74 Ala. 473; *Murphy v. Hunt*, 75 Ala. 438. The land, unless impressed with the distinctive quality and character of a homestead, is not exempt. Owned and occupied, or what is the equivalent of occupancy in the meaning of the statute, a present and actual purpose to use and occupy, are essential conditions. When there has been actual occupancy as a dwelling-place, so as to secure the right of exemption, the statute provides: "A temporary quitting, or leasing the same, for a period of not more than twelve months at any one time, shall not be deemed to be an abandonment of it as a homestead." A prior use and enjoyment as a home is requisite to the statutory privilege of temporarily quitting or leasing; and if the owner does not actually occupy the premises, until a lapse of more than twelve months of continuous time, the right of exemption is lost. To sustain a claim of homestead exemption, there must be averment and proof of occupancy. *Lyns v. Wann*, 72 Ala. 43; *Waugh v. Montgomery*, 67 Ala. 573; *Blum v. Carter*, 63 Ala. 235; Code, §§ 2820, 2843.

There is neither averment nor proof of occupancy before or at the time of the service of process. The availability of the claim of exemption must therefore depend on the determination of the question whether a creditor, by filing a bill to condemn the equitable separate estate of a married woman to the satisfaction of her contracts, and service of process thereon, acquires a lien on the property specifically mentioned, effectual to prevent the accrual of a right of exemption by subsequent occupancy before a decree of condemnation and sale.

It may be regarded as settled in this State, whatever may be the rule in other States, that a bill in equity, with service of process, by a creditor to set aside a fraudulent deed, and have the land of his debtor sold, gives the complainant a lien on the land, which will not be defeated by a *bona fide* sale by the defendant, or under an execution on the judgment of another creditor, which did not have a prior lien. It was so held in *Dargan v. Waring*, 11 Ala. 988; and there has been no subsequent departure from the rule. On the contrary, it has been re-affirmed. *Evans v. Welch*, 63 Ala. 250. It has been held that a fraudulent conveyance of the homestead will not deprive the debtor of the right of exemption, though

Hines v. Duncan.

set aside at the instance of creditors, for the reason, that as the creditor had no right to condemn the homestead to the payment of his debt, he is not injured, and has no cause to complain. In such case, the right of homestead exemption had existed before the filing of the bill, and the debtor had the right to sell and convey without abandoning it. If such be the effect of a suit in equity to set aside a fraudulent conveyance, more cogent reasons must exist in favor of the acquisition of a lien by a creditor, who files a bill to subject the equitable separate estate of a married woman.

At law the contracts of a married woman are void. She is without capacity to contract a debt binding on her personally. Having a separate estate, with the power of disposition, which is the creature of equity, her engagements attach a liability to her estate, and not to her personally; and "as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied." The remedy rests on the jurisdiction of the court to reach and subject assets purely equitable, "a special equitable remedy arising out of a special equitable right." In a bill brought for such purpose, the particular property sought to be subjected must be specifically described. The remedy is also specific, as the court deals only with the property thus mentioned, and its liability. To this extent the proceeding is *in rem*, though in form and other respects, it is a proceeding *in personam*. In *Kelly v. Turner*, 74 Ala. 513, speaking of the operation of the decree on a bill by a creditor resorting to a court of equity to subject the equitable separate estate of a married woman, and the consequent necessity of specifically describing the property on which the decree is to operate, it is said: "In this respect the suit has some of the characteristics of a proceeding *in rem*, though in form and essential elements, it is a suit *inter partes*. A *lis pendens* is created by the institution of the suit operative against all persons coming in subsequently, by purchase or otherwise. It creates a specific lien, if successfully prosecuted to final decree, the decree taking effect, by relation, from the day of the service of summons to answer." Lien, in its enlarged signification, denotes the various charges of debts upon land or personalty, whether created by contract or by statute, or recognized in equity. "In courts of equity, the term lien is used to denote a charge or incumbrance on a thing, when there is

neither *jus in re*, nor *jus ad rem*, nor possession of the thing." *Donald v. Hewitt*, 33 Ala. 534. We do not mean to assert that the mere contract of a married woman creates a lien or distinct charge upon her separate property. But it may be asserted as a general proposition, settled by our former decisions, that a bill in equity brought to subject her separate property to the satisfaction of her contracts, followed by service of process, creates a lien upon the specific property sought to be subjected. Such bill and service of process thereon are in the nature of an equitable levy, and give the court control of the property, which it will not permit to be withdrawn by any subsequent act or title, so as to render the suit ineffectual. In the absence of such bill she may dispose of her property, and a purchaser would acquire title, though he had notice of her debts; but after such suit is instituted, she is not authorized to make a disposition of it by sale or otherwise, or to materially change its *status*. The lien thereby acquired may be defeated or lost by a failure to prosecute the suit to a final decree of condemnation and sale; but it becomes specific when the suit is prosecuted to a final decree. *Miller v. Sherry*, 2 Wall. 237.

It may be said that the lien, being inchoate, will not prevail over a right of homestead exemption acquired by subsequent occupancy, and before the lien is consummated and made specific by a final decree in the suit. The lien acquired by the levy of a writ of attachment is only inchoate, dependent upon the rendition of judgment. If no judgment is rendered, the lien is lost; but if judgment is obtained, it overrides and defeats any conveyance of the property, subsequent to the levy and prior to the judgment. *Reed v. Perkins*, 14 Ala. 231. If the right of a homestead exemption does not exist at the time of the levy of the attachment, its lien cannot be defeated by an occupancy subsequent to its levy. *Kelly v. Dill*, 23 Minn. 435; *Bullem v. Hiatt*, 12 Kans. 98. The land in controversy being charged with the payment of the note of Mrs. Duncan, when the appellant filed the bill and had process served, he acquired a specific right to have it sold for this purpose — to have such charge effectual. When a final decree is made, it relates to and takes effect from the date of the service of process. By the final decree the lien is made specific from this date and overrides and defeats all intervening rights and titles. By no subsequent act of the debtor can the lien be defeated. Permitting the subsequent occupancy of the land as a homestead to prevail over such lien will constitute

Farley v. Moog.

the statute an instrument of fraud instead of a shield of protection. In this respect the lien thus acquired does not differ from a lien secured by the levy of an execution, or of an attachment. It certainly was not the intention of the statutes to confer on the debtor power, by his own act, to deprive a creditor of rights previously acquired. Mrs. Duncan is not entitled to homestead exemption superior to the previously acquired lien of complainant. She does not bring herself within the provisions of the statutes as heretofore construed.

Judgment reversed and cause remanded.

FARLEY V. MOOG.

(79 Ala. 148.)

Partnership — insolvent surviving partner — right of creditors.

Where the surviving partner of a firm becomes insolvent, and his individual creditors levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets.

BILL to enforce rights of partnership creditors against a surviving partner. The opinion states the point. The defendant had judgment below.

Troy, Tompkins & Loudon and Hannis Taylor, for appellant.

G. B. Clark & F. B. Clark, Pillans, Torrey & Hanaw, and Deshon & Lay, for appellees.

SOMERVILLE, J. Upon the dissolution of a partnership, the assets of the firm pass to the surviving partner, the legal title and possession becoming vested in him. For many purposes he is, at law, the legal owner of such property, with power to sell or transfer it *ad libitum*. But in equity he occupies the relation of *quasi* trustee, toward both the personal representative of the deceased partner and the creditors of the partnership. It is said by Mr. Parsons, that "surviving partners are held strictly as trustees, and their conduct in discharging their trust is carefully looked after by courts of equity." Pars. Partn. 442; *Davis v. Sowell*, 77 Ala. 262. Other authorities regard them as trustees in a more modified sense.

This trust originates from the duty imposed on them by law, which is to appropriate the partnership property to the payment of the partnership debts, and to wind up the business of the concern with due diligence and good faith. His powers are accordingly commensurate with this duty, and so long as he continues faithful to his trust, his exclusive right of possession and management will not be interfered with by the court but will be protected. But if he be unfaithful to his trust, or be guilty of any negligence, waste, misconduct, mismanagement, or other wrong, prejudicial to the right of any party interested, a court of equity will often intervene to afford relief. The circumstances under which this will be done cannot be stated with greater certainty by any general rule, which is applicable to all cases. Pars. Partn. (3d ed.) *440, *446; 3 Kent Com. (12th ed.) *64; *Case v. Aberly*, 1 Paige, 398.

In this State, the principle prevails, in accordance with the general weight of authority, that where the interest of one partner in partnership property is levied on and sold under attachment or execution, based on the individual debt of such partner, the sale can be made only subject to the equitable lien of the firm debts and liabilities; and the purchaser acquires nothing more than what remains of the individual partner's interest, after a settlement of the partnership affairs, and the payment of the debts of the concern out of its assets thus subjected to sale. In other words, the effects of a partnership can not be taken by attachment or execution to satisfy a creditor of one of the partners, except to the extent of his interest in the effects after settlement of the partnership debts. He thus purchases a mere right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which may be ascertained to exist upon a settlement, which may be something or nothing. *Warren v. Taylor*, 60 Ala. 218; *Andrews v. Keith*, 34 Ala. 722; *Daniels v. Owens*, 70 Ala. 297; Pars. Partn. (3d ed.) *350, *351; Collyer Partn. (6th Wood's ed.) 187, note; 2 Story Eq. Jur., § 677.

The creditors of a partnership, as such, cannot be said, ordinarily, to have any lien upon the partnership assets for the payment of their claims against the firm. Such a lien or equity, strictly speaking, exists only in favor of the partners themselves, or their personal representatives; and they alone can assert it, as a general rule. Yet there are circumstances under which, according to the better view a court of equity will aid partnership creditors in

Farley v. Moog.

asserting a priority of payment out of partnership property, in preference to individual creditors, even though the latter may have acquired a lien by attachment, or otherwise, as in this case, on the interest of one of the partners. This right of creditors to a *quasi* lien, when it exists, it is true, can be worked out only through the partners themselves, being derivative, and in the nature of a right by subrogation. It is commonly held, for this reason, to be lost, whenever the partners themselves part with their interests in the partnership effects, by making a *bona fide* sale of them for a valuable consideration, or as is sometimes said, "a sale *bona fide* and upon a full and fair consideration." *Mayer v. Clark*, 40 Ala. 259; *Story Partn.* (7th ed.), § 360, note 3.

The creditors may, in our opinion, avail themselves of this *quasi* lien, in cases where there has been a dissolution of the firm by death of one of its members, and the solvency of the surviving partner has supervened. We need not carry the principle further than this at present, as the necessities of the case do not require it, although the authorities perhaps go even further. Mr. Story argues it to exist in cases where there is a dissolution by either the death or bankruptcy of one partner. "In case of a dissolution," he says, "each partner holds the joint property, clothed with a trust to apply it to the payment of the joint debts, and subject thereto to be distributed among the partners according to their respective shares therein;" and he adds, that "it is only in cases where there is a dissolution by the death or bankruptcy of one partner, that the right of the joint creditors can attach, as a *quasi* lien, upon the partnership effects, as a derivative subordinate right, under and through the lien and equity of the partners. *Story Partn.* (7th ed.), §§ 360, 361. In *Pearson v. Keedy*, 6 B. Monr. 128; s. c., 43 Am. Dec. 160, it is said: "The creditor of the firm has no such lien in himself, but only a derivative equity based upon the rights of the partners themselves, in virtue of which he may, in case of the death of one of the partners, and the insolvency of the survivor, be substituted to the rights of the deceased, or his representatives, to have the partnership effects appropriated to the partnership debts. But this right of substitution is based on necessity arising from the insolvency of the survivor, and the consequent insufficiency of the legal remedy." Mr. Parsons also recognizes the existence of such an equity upon the supervening dissolution and insolvency of a partnership, and asserts, that while it may not

be created by this *status* of the firm, it is brought into prominence, and the courts of equity often recognize and enforce such a preference. "If the private creditor," he observes, "levies on the joint property, and, on an account being taken to find the amount covered by the levy, viz., the debtor's share, if it appear that there is enough to satisfy both the joint and separate creditors, the former cannot be said to be preferred. If there is not enough to satisfy both, then there is an insolvency, and the joint creditors are preferred. So in the case of marshalling assets." "This therefore," he adds, "seems to be the sense in which the numerous cases are to be taken which admit the equitable lien only in case of insolvency." Pars. Partn. (3d ed.) 375, 378 (*346, *349), and note g. on page 375. The doctrine, that firm assets must first be applied to the payment of the firm debts, has been said to be "a principle of administration," adopted by the courts where they are called on to intervene in winding up the partnership business; and it is applied where no valid charge upon, or disposition of the assets has been created or made by the firm. *Schidlapp v. Currie*, 55 Miss. 597; s. c., 30 Am. Rep. 530. It cannot therefore be said to rise to the dignity of a strict lien, in the full sense of the word. It is an equity of preference or privity closely approximating a lien, based upon obvious principles of justice; and is a fit correlative of the other principle, now settled in this and some other States, that in cases of insolvency, the separate creditors have a primary claim upon the separate property of the partners, and that partnership creditors are not entitled to share with them, *pari passu*, in the estate of a deceased partner, when insufficient to pay separate debts, and the surviving partner has a joint fund in his hands. *Smith v. Mallory*, 24 Ala. 628; Story Partn., § 363. The justice of the rule is commonly said to consist in the fact that the joint and several debts were each incurred upon the faith of the joint and several funds respectively.

In view of these principles, we are of opinion that the complainants' bill had equity in it, and should not have been dismissed. The attachment levied on the property by the individual creditors might, at law, it is true, reach the entire assets in the hands of the surviving partner, the legal title of which has vested in him. In equity, it reached only his interest in the firm property after the payment of the firm debts; and no remedy existed to ascertain this, and afford protection to complainants' rights, except in a court of

Farley v. Moog

equity. The surviving partner, being a trustee of these assets, was liable to account for them; and he being insolvent, an equity would be enforced in favor of partnership creditors, by which they would have priority of payment out of the partnership assets, no valid alienation having been previously made of such property, and no valid incumbrance having been created on it at the time of the filing of the bill. Equity will assume jurisdiction, not only upon the idea of a trusteeship in the surviving partner, and of his alleged misconduct in the mismanagement of the partnership effects, but of the existence of a *quasi* lien in the partnership creditors, brought into existence by the dissolution of the partnership, and the insolvency of the surviving partner; to which may be added the complication likely to arise from a sale under the attachment proceedings, and the inadequacy of a court of law to ascertain the interest of the surviving partner in the partnership effects, and afford protection to its creditors. *Hubbard v. Curtis*, 8 Iowa, 1; *Washburn v. Bank*, 19 Vt. 278; Pars. Partn. (3d ed.) 282-283; *Freeman v. Stewart*, 41 Miss. 138; *Menagh v. Whitwell*, 52 N. Y. 146; s. c., 11 Am. Rep. 683; *Bank v. Wilkins*, 9 Me. 28; *Skidmore v. Collier*, 15 N. Y. 50; *Blackwell v. Rankin*, 7 N. J. Eq. 152; *Pearson v. Keedy*, 6 B. Monr. 128; 43 Am. Dec. 160; *Tenny v. Johnson*, 43 N. H. 144; *Tillinghast v. Champlain*, 4 R. I. 173.

We cite the foregoing authorities without intending to indorse some of them, which carry the doctrine of a creditor's lien further than sound principle would probably justify.

• The complainants would be entitled to reach only such assets as originally belonged to the firm, or such as were purchased with trust money belonging to the firm, which may have come into the hands of the surviving partner, as the proceeds of sale of the partnership goods or otherwise. We do not construe its purpose to extend further.

The demurrer was improperly sustained to the bill; and the decree of the chancellor must be reversed, and the cause remanded.

WOLFFE V. STATE.

(79 Ala. 301.)

Constitutional law — action by State — waiving tort and suing in assumpsit.

Money was deposited in bank by a tax-collector, to the credit of "I. H. Vincent, treasurer," and checked out by him in the purchase of exchange on New York, the draft being made payable to himself as treasurer, and indorsed in the same way. The indorsee knew that Vincent was State treasurer. *Held*, that the indorsee was chargeable with notice of the official character in which the treasurer held the funds, and applying the money in payment of an individual indebtedness of the treasurer to him, he became liable to the State in an action for money had and received. (*See note, p. 593.*)

ACTION for money had and received. The opinion states the facts. The plaintiff had judgment below.

Rice & Wiley, for appellant.

Thomas N. McClellan, attorney-general, and E. W. Pettus, contra.

STONE, C. J. [Minor questions omitted.] The tax-collector of Montgomery county deposited the State tax-money in bank, to the credit of "I. H. Vincent, treasurer." Vincent was then treasurer of the State of Alabama. He checked out \$20,000 of this money, and with it purchased exchange on New York, the draft made payable to the order of "I. H. Vincent, treasurer." Vincent indorsed the draft to Wolfe, signing the indorsement "I. H. Vincent, treasurer." Wolfe knew Vincent was treasurer of the State of Alabama. The draft was collected, and the proceeds placed by Wolfe to Vincent's credit, in payment of an individual indebtedness from the latter to the former. The present suit was brought to recover this, with other sums from Wolfe; and there was verdict and judgment in favor of the State, for the \$20,000.

There can be no question, that the word "treasurer," appended to Vincent's name, both as payee and indorser of the draft, was notice enough to put Wolfe on inquiry, which if prosecuted, would have led to the discovery that the money was not Vincent's but belonged to the State of Alabama. *Brush v. Ware*, 15 Pet. 93-113; *Duncan v. Jordan*, 15 Wall. 165; *National Bank v. Ins. Co.*, 104

Wolfe v. State.

U. S. 54; *Shaw v. Spencer*, 100 Mass. 382; s. c., 1 Am. Rep. 115; *Pannell v. Hurley*, 2 Coll. 241; *Bodenheim v. Hoskyns*, 2 De Gex, M. & G. 903.

The question of real merit in this case is, whether the State can sue at law for the money, without a previous act of the legislature, ratifying a real or supposed tortious use of the money, or to state it differently, whether there is any power, other than the legislature, which can waive the tort, and authorize a suit in assumpsit. The inquiry may well arise in this case, what tort is to be waived, or what illegal act to be ratified? We may concede that the tax-collector was without authority for placing the tax-money on deposit in bank, and the treasurer was under no obligation to call for it, or to receive it from that depository. We may concede further, that until Vincent checked out the money, it remained the tax-collector's, and was subject to his risk. What was its *status*, after Vincent obtained control of it, by checking it out of bank? Had it not then reached its proper depository and destination? Was it not then the money of the State, in the hands of the proper custodian, the State treasurer? Is the case different from what it would have been, if the money had been sent to the treasurer by a private hand, an irresponsible one, if you please?

The State has need, constantly recurring, of funds in the hands of its fiscal agent, to meet its semi-annual interest payable in New York. There is nothing suspicious, nor out of the usual routine, in the purchase of exchange by the State treasurer with State funds, even for larger amounts than \$20,000. The illegality is found not in the receipt of the money by Vincent. He was entitled to it. Not in the purchase of exchange. He had authority to purchase it. It consisted alone in the application of the funds of the State, having the ear-mark of its ownership, to Vincent's individual uses. In this, both Vincent and Wolfe participated, actively and knowingly. The money was trust money in Vincent's hands, bore on its face the impress that it was trust money; Vincent held it as trustee, and by aiding him in its misapplication, Wolfe constituted himself trustee *in invitum*, co-trustee with Vincent, and liable to account for its misappropriation. *Lee v. Lee*, 67 Ala. 406, and authorities cited, 423; *Milhaus v. Dunham*, 78 Ala. 48; *National Bank v. Insurance Co.*, 104 U. S. 54; *Shaw v. Spencer*, 100 Mass. 382; s. c., 1 Am. Rep. 115; *Skinner v. Merchants' Bank*, 4 Allen, 290; *Cobb v. Wanemaker*, 78 Penn. St. 501.

We again inquire, what act developed in this transaction is it necessary to ratify, or what tort to waive, in order to maintain this suit? This is not the case of an alleged change of the character of the thing claimed, such as the sale of a chattel, and conversion of it into money, or into some other chattel. In such case, there must be a ratification of the unauthorized sale, before the substituted money or article can be claimed; and claiming the money validates the sale, and vests in the purchaser a title to the property converted. *Butler v. O'Brien*, 5 Ala. 316; *Harrison v. Gardner*, 10 Ala. 185; *Williams v. Jones*, at present term. This requires ratification, which can only be done by competent authority. In this case, there has been no change of the character of the thing claimed. It was money at the beginning; it is still money. Claiming it of Wolfe is no abandonment of Vincent's liability, any more than suing B., for an alleged second conversion of a chattel previously converted by A., would be an abandonment of all claim against A. Each is liable to suit and judgment; and nothing less than satisfaction by one will discharge the other. *Beasley v. Mitchell*, 9 Ala. 780; *Spivey v. Morris*, 18 Ala. 254; *Bott v. McCoy*, 20 Ala. 578; *Hyde v. Noble*, 38 Am. Dec. 508; *Sessions v. Johnson*, 95 U. S. 347; Whart. Agency, § 72.

The present case is distinguishable from *Van Dyke v. State*, 24 Ala. 81. In that case the money was paid to a person not authorized to receive it, a mere private agent of the depositors, so far as that service was concerned. The money never reached the hands of the treasurer, and therefore it never became the State's money. What was done did not discharge the tax-debtors, any more than a delivery of the money to any other faithless agent would have discharged them. Van Dyke, though not liable to the State, in the absence of ratification of the payment to him by competent authority, was nevertheless liable to the parties who deposited the money with him. In this case, when Vincent drew the money out of the bank, the tax-collector was *eo instanti* discharged, and at the same time Vincent and his sureties became bound to the State for its faithful administration.

The two cases of *Perley v. County of Muskegon*, 32 Mich. 132; s. c., 20 Am. Rep. 637, and *State v. Keim*, 8 Neb. 63, are not reconcilable with our views, nor are they reconcilable with our former rulings. They ignore the principle, that an outsider, by aiding in the misapplication of trust funds, knowing them to be such, constitutes himself trustee, and must account as trustee.

 Tabler v. Sheffield Land, Iron and Coal Company.

The case is thus narrowed down to this: Wolffe obtained possession of \$20,000 of the State's money, illegally, charged with knowledge that it was the money of the State, which Vincent had no authority to pay to him on private account. He received it illegally, and holds it tortiously.

There is no matter of account to be settled, for Wolffe could be entitled to no credits against it. The action of assumpsit-money had and received, will lie for its recovery. 1 Brick. Dig. 140, §§ 61, 72, 73; *Hitchcock v. Lukens*, 8 Port. 333; *Vincent v. Rogers*, 30 Ala. 471; s. c., 33 Ala. 224; *Finney v. Cochran*, 37 Am. Dec. 450; s. c., 1 Watts & Serg. 112.

Judgment affirmed.

CLOPTON, J., not sitting.

NOTE BY THE REPORTER.—In *State v. Keim*, 8 Neb. 68, cited in the principal case, the action was to recover a deposit made by the State with the defendants for safe-keeping, payable on demand. By law, the State treasurer was the only authorized custodian of the State funds, and loans were prohibited. It was held that the action would not lie.

 TABLER V. SHEFFIELD LAND, IRON AND COAL COMPANY.

(79 Ala. 377.)

Contract — labor tickets — assignability.

A "labor ticket," or certificate for wages, issued by a corporation, and on its face "payable to employee only," and "not transferable," is not assignable.

ACTION on labor tickets. The opinion states the case.

James Jackson, for appellant.

Emmet O'Neal, contra.

SOMERVILLE, J. The action is brought by the appellants, as plaintiffs in the court below, against the appellee, a body corporate, to recover a certain amount alleged to be due them as transferees of a large number of labor tickets, or time checks, issued by authority of the defendant. These instruments are printed, and are denominated on their face, each, as being a "labor ticket." The name of the defendant company, the "Sheffield Land, Iron and

Tabler v. Sheffield Land, Iron and Coal Company.

Coal Company," appears at the top and not as a subscribed signature. On the right margin and across the face of the paper, the initials "E. P. M." occur, which are alleged to have been signed by one E. P. Miller, the agent of the defendant. The words "one day," etc., occur, without specifying any particular sum due for such time or service, except in case of a few tickets which call for small amounts. All of these tickets are payable June 15, 1884, "to employees only," and are indorsed "not transferable." No averment is made in the complaint that they were issued as change bills, and were intended to circulate as money, in contravention of the statute. The common counts are added, and the averment is made that the transferees are unknown by name to the plaintiffs.

The Circuit Court, on demurrer to the complaint, held that the action would not lie, and on refusal of plaintiffs to amend the suit was dismissed.

We are of the opinion that this ruling was free from error. The certificates show, on their face, that they are payable to the employees only, and to no one else. They are expressly declared not to be transferable, which negatives any promise of defendant, otherwise implied, that payment would be made to any assignee or transferee of the holders. They were issued with this express understanding, which was assented to by the employees when they received them; and the plaintiffs took the instruments with full notice of this restriction, because it appeared on the face of the paper. The transferability of the paper was thus destroyed by the consent of the original parties to it. *Durr v. State*, 59 Ala. 24.

It cannot be said that the policy of the law is opposed to the restriction thus imposed. On the contrary, under the peculiar circumstances of this case it highly favors such restriction. At common law choses in action were not transferable, their transfer being enforced only in equity. This ancient rule has been abrogated only by the necessities of modern commerce. But there is a certain kind of paper, passing under the name of "change-bills," which are prohibited by statute to be issued in this State without special authority of law. They include bills of exchange, notes, bonds, or "instruments of any description, whatever may be their form or device," which are issued with intent to circulate as money. Corporations, or other persons who issue or circulate such paper without authority of law are liable to indictment, and to a heavy civil penalty of interest at fifty per cent per annum. Code, 1876, §§ 1424-26,

Tabler v. Sheffield Land, Iron and Coal Company

4433-34. It was very important for defendant that its officers should not be liable to this penalty or punishment. If the certificates in question were permitted to pass from hand to hand by transfer, it might be strong evidence of an intention on the part of the maker that they should circulate as money, and answer all its purposes in the business of the company, or even in the neighborhood of its residence. A proper mode of rebutting the existence of such intention was to make the paper non-transferable. There might be circumstances under which this mode of restriction would afford the only protection practicable to the maker, short of perpetual litigation rendered unendurable by the multiplicity of suits which could be instituted on such a form of paper. *Barnett v. State*, 54 Ala. 579; *Bliss v. Anderson*, 31 Ala. 612.

There is yet another reason why the policy of the law would favor a contract by the employee that the promise should not be transferable, but should inure to his benefit only. There may have been discounts by way of set-off in favor of defendant against some of the employees, which could be available only so long as the names of these particular promisees were known. The paper, not being negotiable, would be subject to this equity. If allowed to pass to a stranger it might often be impracticable to ascertain who was the original holder, and the right would thus be lost. Such certificates or tickets moreover are often placed in the hands of employees as a convenient mode of making advances to them for their services, especially when payable in merchandise as they frequently are. As the law should encourage humanity to the needy, so it should favor any contract intended to prevent a transfer of paper which would operate as a fraud on any benevolent intentions of the maker.

The assignments of demurrer were well taken to all except the common counts. The latter counts were in the form prescribed by the Code, and the court erred in not holding them good.

Reversed and remanded.

CLOPTON, J., not sitting.

JOHNSON V. HOLIFIELD.

(79 Ala. 422.)

Will — charitable trust — preservation of private burying-ground.

A bequest of money to county commissioners, "and their successors in office, or to such authority as may control and direct the finances of said county, to be held in perpetuity in trust," and the interest to be expended annually in the repair, preservation and neat keeping of the graves and monuments of the testatrix and other named relatives, is not a bequest to a charitable use, within the exception to the rule against perpetuities, and is void. (*See note, p. 599.*)

BILL for construction of a bequest. The chancellor held the bequest valid. The opinion states the case.

Troy, Tompkins & London, for appellant.

Geo. P. Harrison, Jr., contra.

CLOPTON, J. The will of Mary F. McLemore contains the following clause: "I give and bequeath to the commissioners of roads and revenues of the county of Chambers and State of Alabama, and their successors in office, or to such authority as may control and direct the finances of said county of Chambers and State, the sum of \$1,000, to be held in perpetuity in trust, and direct that the legal interest arising from said sum of \$1,000 be expended annually in the repair, preservation, and neat keeping of the graves and monuments of myself, my first husband, William George, my second husband, Col. Charles McLemore, and my father and mother, all being and will be buried in said county of Chambers, Ala.; and I earnestly entreat this bequest and trust will be forever faithfully executed; said sum of \$1,000 to be raised from the sale of my real estate in the city of Birmingham, Ala." The executor, having sold the real estate, and having in possession the requisite sum of money, applies to the court to construe this clause of the will as to the validity of the bequest; and if it held to be valid, for the appointment of a trustee, or directions to whom the money shall be paid.

The bequest, by its own terms, attempts to create a perpetuity; and is invalid, as repugnant to the rule against perpetuities, unless

it can be brought within the exception — a charitable use. 1 Perry Trusts, §§ 377–380. However strongly the courts may be moved to carry into effect the intention and objects of the testator in the construction and execution of wills, such purpose cannot be accomplished, when any principle of law will be thereby violated. The rule against perpetuities, so firmly established and universally sustained, with a single exception, is founded on considerations of public policy. It has been said: “A perpetuity is a thing odious in the law, and destructive to the Commonwealth; it would stop commerce, and prevent the circulation of property.” A private trust cannot be created, so as to operate the inalienability of property beyond the period prescribed by the rule. But gifts to charitable uses, being highly favored by the courts, and the public being regarded as concerned in upholding such trusts, will be sustained and carried into effect, though their duration may be perpetual. Hence, the sole subject of inquiry is, whether the bequest creates a private trust, or is its object a charitable use, in the legal sense.

It may be conceded, that a testator may make a valid bequest of money to erect a tomb, or monument; and that a valid trust to preserve and keep in repair a vault or tomb, or burying-ground may arise, when imposed as a condition to a bequest of property to individuals or to a society, a perpetuity not being created. Within the latter class falls *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 139, in which the vice-chancellor says: “Now I am satisfied that a condition for keeping a tomb in repair is not a charitable use, and is not illegal. It may be illegal to vest property in perpetuity in trust for that purpose, so as to create a perpetuity; but a direction that the wife and Mary Martha Lockley are during their lives to enjoy the annuity, and are to keep the tomb in repair, is quite lawful; it is a valid condition imposed on the enjoyment.” And it may be that a bequest to maintain and keep in repair a public cemetery, though in perpetuity, would be sustained. The present case does not fall in either of these classes. The trust is, that the interest shall be expended annually, in the repair, preservation and neat keeping of the graves and monuments of testatrix and four other named persons, a trust characterized by an English vice-chancellor as merely honorary.

Trusts for charitable uses did not originate in the English statute, nor are they limited to the objects therein enumerated. Whatever object comes within the spirit and intendment of the

statute is included. GRAY, J., gives a clear and comprehensive definition in *Jackson v. Phillips*, 14 Allen, 539. He says: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." In *Dexter v. Gardner*, 7 Allen, 243, a bequest, which gave personal property to the overseers of the "Long Plain Friends' preparatory meeting and their successors in office in trust forever, the income to be appropriated for the benefit of the Friends' meeting in Fairhaven and Rochester," was sustained on the ground that all the objects, to which the overseers had a right, by the usages of their denomination, to apply their funds, are to be regarded as charitable. The objects were the maintenance of religious worship, aiding the sick and poor, and the purchase and repair of burying grounds. But in this case the distinction is recognized. It is said: "The case of *Doe v. Pitcher*, 6 Taunt. 359, in which it was held that a grant in trust to repair, and if need be, to rebuild a vault and tomb for a private family, was not a charity, is not in point, because the object there was merely secular." And in a late case in the same court it is held that a provision by will, for perpetually preserving, adorning and repairing a private mortuary monument, is void. *Bates v. Bates*, 134 Mass. 110; s. c., 45 Am. Rep. 305. In *Swasey v. American Bible Society*, 57 Me. 523, a legacy to keep in repair a family burying ground was upheld. But in a recent case it was also held that a bequest of money, the income to be expended forever to keep the testator's lot in a certain burying ground, in good order and condition, is in perpetuity, and void. *Piper v. Moulton*, 72 Me. 155.

In this State, the jurisdiction of courts of equity, in such cases, is independent of the statute of uses, or of any prerogative power of the court, and is founded on its original and inherent power to sustain such trusts, because of their charitable uses, a jurisdiction which was exercised prior to the statute. Excepting the doctrine of *cy pres*, of the prerogative power, and of superstitious uses, as

Johnson v. Holifield.

inconsistent with the character of our institutions, "the law of charities, as administered in the English Court of Chancery, is substantially our law." *Williams v. Pearson*, 38 Ala. 299. From the English law, as modified by our decisions, must be mainly derived the rules and principles governing the nature and validity of the bequest under consideration. It seems to be well settled by the course of decisions, that a bequest of money, the interest thereon to be perpetually applied to preserving and keeping in repairs the graves and monuments of testatrix and other named persons, is repugnant to the rule against perpetuities, and void. *Richard v. Robson*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616; *Doe v. Pitcher*, 6 Taunt. 358; *Hoar v. Osborne*, L. R., 1 Eq. 583; *Dawson v. Small*, L. R., 18 Eq. 114; *Thompson v. Pitcher*, 2 Marsh. 61; 1 Jarm. Wills (Big. ed.), 211; 2 Williams Ex'rs, 1140.

The bequest under consideration possesses none of the elements of a charitable use. It is not a gift to any public purpose. In the object, for which the interest on the money is to be expended, the public have no concerns. There is not the requisite vagueness and indefiniteness as to the number of persons to be benefited. It is not to keep in repair a family burying ground, in which rich and poor members may be buried. The object is to preserve the graves and monuments of testatrix and four relatives, specifically designated. The purpose is merely secular. However gratifying and creditable to the heart of the testatrix may be the object of the bequest, we are forced by the current and weight of authority, both in England and America, to declare that it is not a charitable use in the legal sense; and that the bequest attempts to create a perpetuity, and is void.

The record does not show whether the residuary legatee is also the heir at law. If not, the heir is not made a party. We therefore express no opinion, to whom the money bequeathed passes, the legacy being void.

The decree of the chancellor is reversed, and a decree will be here rendered declaring the bequest void. The appellee will pay the costs of suit in the Chancery Court, and the cost of appeal, the amount so paid to be retained by him out of the assets in his hands as executor.

Decree reversed. *

NOTE BY THE REPORTER.—In *Holifield v. Robinson*, 79 Ala. 419, on the same facts, it was held that the trust was void for want of capacity in the trustees to take. The court said: "If one such burden is assumed, so in

like manner another may be. The result might finally be, that in the course of a few generations, the chief time of these county officials would be monopolized in discharging duties which might more appropriately be devolved upon the sexton of a churchyard or of a city cemetery."

A bequest for permanently keeping burial lots in order is void. *Coit v. Comstock*, 51 Conn. 352; s. c., 50 Am. Rep. 29. To the same effect, *Bates v. Bates*, 184 Mass. 110; s. c., 45 Am. Rep. 305. See note, 39 Am. Rep. 738, 739.

In *re Vaughan*; *Vaughan v. Thomas*, Ch. Div., June 11, 1886, 55 L. T. Rep. (N. S.) 547, a testator bequeathed £500 in trust to apply such part of the income thereof as might be necessary in keeping in repair a family vault, and the residue in keeping in repair his brother's tomb and the parish churchyard. *Held*, that the gift to repair the family vault and brother's tomb were void, but that the gift to repair the churchyard was good as a charitable gift for a public object. NORTH, J., said: "It seems to me that the repair of a parish churchyard is clearly for the benefit of the inhabitants of the parish. In the first place it was the duty of the parishioners to keep their churchyard in repair. * * * Then again a case was cited which shows that if a person whose duty it is to repair the churchyard does not repair it he is subject to indictment. It is clear that the repair of a church is beyond all question a charitable object. So too the repair of a parsonage. *Attorney-General v. Bishop of Chester*, 1 Bro. C. C. 444, is an authority for that. The repair of ornaments of a church has been held a charitable object in *Hoare v. Osborne*, L. R., 1 Eq. 585. There KINDERSLEY, V. C., said: 'With respect to the monument in the church, there is no decision on the point how far a gift for perpetual repair, not of the fabric of the church, but of the ornaments in the church can be treated as a charity. In the absence of authority, I think I ought to hold such a gift to be a charity, and as such good.' * * * To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's house,' and a gift to keep in repair the churchyard round it, which is often called 'God's acre.' Then it is said that keeping in repair the tombs in a churchyard is only the same thing as keeping in repair a tomb in the churchyard. I do not think so. A testator providing for the repair of a family tomb is only ministering to his own private feeling or pride, or it may be to a feeling of affection he has for his own relations, and it is not for the benefit of the parish at large that a particular tomb should be kept in repair. But in respect of the repair of the churchyard as a whole, it is for their benefit. That distinction was pointed out by Lord ROMILLY in the case of *Rickard v. Robson*, 7 L. T. Rep. (N. S.) 87; 31 Beav. 244, where he says: 'I have had to consider this point lately in a case respecting the promulgation of the doctrines of Joanna Southcote. In that case I thought the gift was intended to be for a public benefit, and that it was a charitable gift which could be supported; but on comparing it with the present I am satisfied that this does not come within the term 'charity,' and is not within any of the words used in the preamble of the statute (43 Eliz., ch. 4). *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255, and the other cases of *Thompson v. Shakespeare*, 1 L. T. Rep. (N. S.) 398; *Johns. Chy. (Eng.)* 612, showing that a gift merely for the purpose of keeping up a tomb or building which is of no public benefit, and only an individual advantage, is not a charitable use

Snodgrass v. Reynolds.

but a perpetuity. The cases run into very fine distinction, because if the gift is to keep up an institution for the benefit of the public, then it is clearly a charity. But that does not occur in this case, for here the gift is merely to keep up certain individuals' tombs.' It seems to me clear therefore that if the gift had been for keeping in repair the churchyard and nothing else it would have been good. But in the present case the gift of the residue of the income was 'in or toward the expense of repairing or keeping in repair the tomb erected to the memory of my late brother Thomas, and the repairing and keeping in repair the same parish churchyard;' and it is said to be one complete and entire gift, a part of which at any rate is bad, and that the amount of the bad part cannot be ascertained, and therefore the whole is bad. That proposition seems to me not in accordance with the authorities. There is no difficulty in ascertaining the respective amounts to be assigned to the several objects which is what ought to be done, if possible. * * * I find no difficulty here in saying that the gift of the residue is not void altogether; but that to the extent to which the gift is to repair the churchyard it is good; and I do not think there can be any difficulty in ascertaining what the expense of keeping in repair the brother's tomb would be. I need not fix the amount at the present moment, I can direct an inquiry as to that. To the extent of the capital representing the annual amount necessary to keep that tomb in repair, treating the capital as invested in consols, the gift fails. The rest of the £500 should be invested in the manner directed on trust to apply the income in repairing the parish churchyard."

SNODGRASS V. REYNOLDS.

(79 Ala. 452.)

Damages—measure of—landlord and tenant—breach of contract to put in possession.

In an action by a lessee against a lessor for breach of a covenant to give possession, although there was no fraud or wrong conduct, the measure of damages is the value of the lease. (*See note, p. 606.*)

ACTION for breach of covenant. The head-note states the point. The plaintiff had judgment below.

S. F. Rice, E. P. Morrisett and Porter & Martin, for appellant.

H. C. Tompkins and Henry Wilson, contra.

CLOPTON, J. The defendant requested the following instruction: "If you should find for the plaintiff, and should believe from the evidence that the defendant King was not guilty of any

fraud, or wrongful conduct in the matter, then you will find for the plaintiff the amount he paid for the lease, with interest to this time." When referred to the evidence, the proposition of this charge is, that in an action by the lessee, for the breach of an express term in the contract to put the lessee in possession, the measure of damages, in the absence of fraud or wrongful conduct, is the consideration paid for the lease, with interest.

The general common-law rule, as to the measure of damages for the breach of a contract, is one of indemnity; intended to give compensation for the loss sustained, and to put the party, as nearly as practicable, in the same condition in which he would have been had the contract been performed. In an action against a vendor, for a failure or refusal to perform a contract for the sale of personal property, the measure of damages is the difference between the contract and market prices at the time of the breach. An exception to the general rule, in favor of a vendor of real property, who from inability to make title, fails to perform his contract of sale and conveyance made in good faith, was first admitted in *Flureau v. Thornhill*, 2 W. Bl. 1078; where it was held, that in such case the vendee could recover only the amount of payments made, with interest and costs. The doctrine of this case has been followed in many subsequent cases, and may be regarded as the settled rule in England. It has been adopted in this and many other States. In *Bibb v. Freeman*, 59 Ala. 612, the purchase-money, with interest, was held to be the measure of damages, in a recovery based on a broken contract of seisin; and in *Kingsbury v. Milner*, 69 Ala. 504, the same measure of damages was applied in a broken contract of warranty.

The rule in *Flureau v. Thornhill* is an admitted exception to the general rule, its effect being to put the purchaser in the condition he would have been had no contract been made. It has not generally been satisfactory to the courts, and has been repudiated by many; and individual members of courts which have followed it, while yielding to the weight of authority, have expressed dissatisfaction. Frequent attempts have been made to restrict its application, or to relax or modify it in particular cases. If the vendor is guilty of wrongful conduct, he is generally regarded as without the benefit of the rule, and liable for compensatory damages; though it has been sometimes said, that in such case the action should be founded on the tort. The rule may now be regarded as "confined

Snodgrass v. Reynolds.

to cases of inability to perform, arising from a discovery, after the contract, of a previously unsuspected defect in the vendor's title." *Pumpelly v. Phelps*, 40 N. J. Eq. 60; *Drake v. Baker*, 34 N. J. L. 358; *Stevenson v. Harrison*, 3 Litt. 170; 2 Suth. Dam. 207.

Counsel for appellant strenuously insist, that the rule as between vendor and vendee ought to be applied between lessor and lessee. The contention is founded on analogy, based on the doctrine that a lease for a defined term is, in its nature, a sale of an interest in the land *pro tanto*. And our attention has been called to the decisions in New York, in which the rule was applied to cases of eviction of the tenant; and it was held that the rents reserved, when no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. These decisions rest the rule on the assumption, that the parties agree on the rent reserved as the value of the lease; and as the rent ceases on eviction, "the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property." *Kelly v. Dutch Church*, 2 Hill, 105; *Noyes v. Anderson*, 1 Duer, 342. This court is urged to follow the New York decisions.

When this case was before us on a former appeal (67 Ala. 229), there was no proof that the defendant expressly bound himself to put the plaintiff in possession. On the record as then presented, it was said: "The prime motive of the contract is, that the lessee shall have possession; as much so, as if a chattel were the subject of the purchase. Delivery is one of the elements of every executed contract." On the last trial, there was evidence tending to show that one of the express terms of the contract was, that defendant should put plaintiff in possession. If this evidence be believed, until the plaintiff was put in possession, the contract remained unexecuted; it was an executory lease of the premises. Being executory, if we follow analogy, the damages must be assessed on the same principle as in cases of executory contracts for the sale and conveyance of land.

Courts, which have followed the doctrine in *Flureau v. Thornhill*, have applied the general, instead of the exceptional rule, in actions founded on executory contracts. In *Taylor v. Barnes*, 69 N. Y. 430, ALLEN, J., alluding to the rule which limits the recovery to the consideration, says: "But it is not applied in cases of executory contracts, where the vendor has sold lands to

which he has not a perfect title, where he undertakes to complete and perfect it. In this case, there is an express agreement for indemnity; and a recovery, which does not give the vendee the benefit of his bargain, and the value of his purchase, does not indemnify him against loss. The true rule of damages, as a measure of indemnity in such case, is the value of the land at the time of the eviction, or other breach of the contract, with interest from that time." And this court has held, that in actions on executory contracts for the sale of lands, the measure of damages is the value of the land at the time of the breach. *Whitesides v. Jennings*, 19 Ala. 784; *Pinkston v. Huie*, 9 Ala. 252; *Lewis v. Lee*, 15 Ind. 499.

Where the exceptional rule between vendor and purchaser is not extended, the general rule as to the measure of damages in an action against the landlord, where possession has never been delivered, or the tenant has been evicted by a paramount title, is the difference between the rent reserved and the value of the land for the term. *Adair v. Bogle*, 20 Iowa, 238; *Dexter v. Manley*, 4 Cush. 14; *Dobbins v. Duquid*, 65 Ill. 464; *Newbrough v. Walker*, 8 Gratt. 16. In England, courts which followed the exceptional rule, have refused to apply it between lessor and lessee. The exceptional rule has been repudiated except as between vendor and vendee, and the general rule applied in actions on broken covenants in contracts of lease. In *Locke v. Furze*, 19 C. B. (N. S.) 96, BYLES, J., in respect to the rule says: "That is an anomalous rule, confined, for the sake of convenience, to the case of vendor and purchaser. In all other cases of breach of contract, the measure of damages is the loss the plaintiff has proximately sustained by reason of the breach of the defendant's contract." This case was, on appeal, affirmed in the Exchequer Chamber, L. R., 1 C. P. 441. MARTIN, B., says: "It is clearly an exception; it is contrary to the rule of the common law; it had not the unqualified approval of Lord TENTERDEN; and I see no reason why it should be extended." And CHANNELL, B., observes: The testator expressly bargained for that which he could not perform; and therefore I think the proper principle, upon which the damages should be assessed, is a full compensation to the plaintiff for that which he has lost, not limited to the amount actually paid by him." Where the lessor had given a covenant for quiet enjoyment, and the lessee was evicted, it was also held in *Williams v. Burrell*, 50

Snodgrass v. Reynolds.

E. C. L. 401, that he was entitled to recover the value of the term. And in *Trull v. Granger*, 8 N. Y. 115, it was held, that the tenant may maintain an action for damages upon the implied agreement of the lessor to yield him possession, or in tort for the violation of the duty arising from the relation of landlord and tenant; and that the measure of damages in either case is the difference between the rent reserved, and the value of the premises for the term. It is true, that in this case the lessors denied the right of possession.

The record exculpates the lessor from any fraud or wrongful conduct. It appears that he was not only willing, but made efforts to perform his contract. We have already said, that a distinction has been recognized, where the vendor is innocent, and where he is guilty of wrongful conduct. Without discussing the sufficiency of the grounds on which this difference rests, we can perceive no substantial reason for its extension to contracts between lessor and lessee. Whether the lessor acted from a bad motive, or in good faith, the actual pecuniary damage to the lessee is the same in either case. *Doherty v. Dolan*, 68 Me. 87; *Walker v. Moore*, 10 B. & C. 416. The defendant bargained for that which he was unable to perform, to put the plaintiff in possession, and on principle, he is bound to make compensation to the plaintiff for the loss he has sustained.

The grounds on which the rule as between vendor and vendee is founded have been, as assigned by one of the justices in the leading case, an implied condition that the vendor has good title; and also as stated by subsequent justices, the uncertainty, arising from the complications of the law, that the vendor can effectively make a good title, and the vendee taking the property with that knowledge. It has also been said, that the rule finds its defense "in considerations of public policy, since the amount of damages, necessary to compensate the vendee, might in some cases ruin an innocent vendor." Neither of the grounds exists, nor do the considerations of public policy apply, in the matter of a lease. Though a lease for a defined term may be, in its nature, a sale of a partial, limited interest in the land, it is not a freehold, but a chattel, the right to possess and use for the specified term. It seems, on reason, that the general rule, which governs in actions on contracts for the sale of specified chattels, is more appropriate, and more largely meets the measure of compensation, than an exceptional rule admitted on grounds and considerations confessedly peculiar to

Snodgrass v. Reynolds.

vendor and vendee. There can be no difference in principle, whether the contract be for the sale of personal property, or for the possession and use of real property for a year or term of years. *Hopkins v. Lee*, 6 Wheat. 109.

We do not wish to be understood as expressing or intimating a desire or purpose to disturb the rule as between vendor and vendee, which, from its long existence, may be regarded as a rule of property. What we have said in respect to it has been as bearing on the question of its extension to cases other than those in which it was first admitted. Though there is no intent to interfere with the rule as now confined, we cannot see sufficient reason to extend it to cases other than vendor and purchaser. Such extension would be the extension of an exceptional, and it may be said arbitrary rule, engrafting exceptions on a general rule, which are not founded on pressing reasons, or a necessity to promote the ends of justice. Such extension would transgress the purpose of courts to carry out contracts as made by the parties and not to make contracts for them, by implying conditions not expressed, and not justified by any authorized legal interpretation. Especially are we unwilling to admit it in a recovery based on the breach of an express term of a contract of lease to put the tenant in possession. If the lessor chose to absolutely agree to deliver possession, he must be held responsible for his failure, though he may have acted in ignorance of an adverse occupancy, or if aware of it, relied on his ability to remove the obstruction. In such case, the general rule must govern. Any thing less will not compensate the lessee for the loss of his bargain.

[Minor points omitted.]

Judgment affirmed.

NOTE BY THE REPORTER. — In *Aran v. Frey*, 69 Ind. 91, an action for failure to give possession under a lease of lands, evidence to prove the amount and value of the possible crops was held admissible to lay the ground for damages.

In an action by lessees for breach of a covenant for quiet enjoyment, they having been evicted by a title paramount; the measure of damages is the difference between the rent reserved and the fair rental value of the premises. *Filegibbons v. Freisen*, 12 Daly (N. Y. Com. Pleas), 419, citing *Mack v. Patchin*, 42 N. Y. 167; s. c., 1 Am. Rep. 506. To the same effect, *Fondavila v. Jourgensen*, 52 Super. Ct. 408; *Coleman v. King*, 19 Week. Dig. (Sup. Ct., Gen. Term) 551; *Denison v. Ford*, 10 Daly, 412. In *Chatterton v. Fox*, 5 Duer, 64, it is held that the tenant, evicted during the term, may recover the difference between the value of the lease and the stipulated rent, and any

Snodgrass v. Reynolds.

extra expense of moving, but not any increased rent which he has been compelled to pay for other premises. In *Giles v. O'Toole*, 4 Barb. 261, the tenant was allowed the expense incurred in preparing to remove to and occupy the premises, and the difference between the real value of the rent and that reserved, but not profits which he might have made in the business there to be carried on.

In *Shaw v. Hoffman*, 26 Mich. 163, it was held, without much consideration or citation of authorities, that a tenant unlawfully evicted from a stable may recover for loss of profits in boarding horses and difference in keeping his own and hiring them boarded.

In Maine and Massachusetts the value of the term at the time of eviction is the test. *Hardy v. Nelson*, 27 Me. 525; *Dexter v. Manley*, 4 Cush. 14.

In *Smith v. Wunderlich*, 70 Ill. 426, it was held that where a tenant is ousted by his landlord before the expiration of his term, and without any re-entry he brings an action of trespass, he can recover damages for the ouster itself and all the necessary and natural consequences thereof, but not for the value of his unexpired term, nor for the mesne profits thereof.

In *Ross v. Wynn*, 42 Ark. 257, the court said: "The books agree that in an action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term.

"If the value of the premises for the term is no greater than the rent which tenant has agreed to pay, then the latter is not substantially injured, and can in general recover only nominal damages, though the landlord without just cause refused to give possession. But if the value of the premises is greater than the rent to be paid, the lessee is entitled to the benefit of his contract, and this will ordinarily consist of the difference between the two amounts. *Adair v. Boyle*, 20 Iowa, 242; *Trull v. Granger*, 4 Seld. 115; 8 Suth. Dam. 150; *Green v. Williams*, 45 Ill. 200; *Dean v. Roesler*, 1 Hilton, 422.

"It seems also from the current of adjudications, that if other damages have resulted as the direct and necessary or natural consequence of the defendant's breach of the contract, these are also recoverable. For example, if plaintiff in good faith, and relying on the contract, has made preparations to take possession, and these have been rendered useless by the defendant's refusal to comply with his contract, the authorities hold that there may be a recovery for the loss thus sustained. 8 Suth. Dam. 151; *Adair v. Boyle*, *supra*; *Green v. Williams*, *supra*; *Driggs v. Dwight*, 17 Wend. 71; *Newbough v. Walker*, 8 Gratt. 16. Per contra, see *Hughes v. Hood*, 50 Mo. 350."

In *Lock v. Furze*, L. R., 1 C. P. 441, it was held that the rule in *Flureau v. Thornhill*, 3 W. Bl. 1078, does not apply to the case of a lease granted by one who has no title, and that the measure of damages is the value of the lease, in addition to the consideration paid and the expenses. In this case counsel and court cite American decisions and text-books. CHANNEL, B., said, "the plaintiff was entitled to recover what he had lost by the breach of the contract." MARTIN, B., said: "Why should he not indemnify the other contracting party for what he has lost?" BLACKBURN, J., said: "Why should

Snodgrass v. Reynolds.

the lessee, who has lost a valuable lease, have a less measure of damages than he would have been entitled to if by the testator's breach of contract he had lost a slip of a given value? *Flureau v. Thornhill* does not apply to the case of an executed contract. There is no case (except that of *Pomeroy v. Partington*, 3 T. R. 665, cited in Sedgwick on Damages, 157) where that has ever been suggested. The American cases are infinitely various. Some of the States seem to adopt the common law of England. It may be that there is such a well-established custom in New York and some of the other States of America as is stated by Mr. Sedgwick. But we must be governed by our own law. The true measure of damages for the breach of a contract, such as this is, what has the plaintiff lost by the breach of the contract? and there is no difference in this respect between a contract for the sale of real property and a contract for a chattel."

In *Poposkey v. Munkwitz*, Supreme Court of Wisconsin, March 1, 1887, an action for breach of a contract for quiet possession under a lease to plaintiff, it appeared that defendant executed the lease knowing that a third party was in possession under a lease running for the term of eighteen months after the date fixed upon for plaintiff to take possession; that plaintiff had been carrying on his business in the immediate vicinity of the rented store for many years; that being unable to get possession under his lease, he endeavored, but was unable, to rent another store in the vicinity, and his business was broken up, and his goods damaged by defendant's default. *Held*, if defendant was unaware of the purposes for which plaintiff hired the store, the measure of damages would be the difference between the rent reserved in the lease and the actual rental value; but if defendant knew that plaintiff intended to carry on his old business there, the measure of damages would be the damage to his business; and testimony to show such knowledge of defendant should be admitted, and if shown, proof should be admitted of the value of the business.

The court said: "It is substantially an action for a breach of the covenant for quiet enjoyment contained in the lease. 1 Tayl. Landl. & Ten., § 309. This appeal presents for determination the question, what is the true rule of damages for a breach of that covenant in this case, in view of the facts proved and offered to be proved therein? The rule is undoubtedly the same as in an action for a breach of covenants for title in an absolute conveyance; that is to say, had the plaintiff purchased the store No. 411 Broadway of the defendant, and taken an absolute conveyance thereof, instead of a lease for five or more years, under the same circumstances which existed when the lease was executed, the measure of his damages for a breach of the covenants for title in such conveyance would be the same that it is for a breach of the covenant for quiet enjoyment in the lease. 3 Suth. Dam. 147; *Blossom v. Knox*, 3 Pin. 262. Indeed, the covenant for quiet enjoyment is one of the covenants for title in a conveyance. Rawle Cov. 17. It is also said to be 'an assurance consequent upon a defective title.' Rawle Cov. 125.

"The general rule of damages which obtains in England and many of our sister States for a breach of covenant for title was first authoritatively laid down in 1775, in the case in the common pleas of *Flureau v. Thornhill*, 2 W. Bl. 1078. The defendant covenanted to sell the plaintiff a rent for a term of

Snodgrass v. Reynolds.

years issuing out of leasehold premises, but without fault on his part the defendant was unable to make good title thereto. The plaintiff claimed damages for the loss of his bargain, but it was held that he was not entitled thereto. DE GREY, C. J., said: 'Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost.' BLACKSTONE, J., said: 'These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.' The rule of the above case has been much considered in both England and this country; and while its scope has been more clearly defined and its application somewhat limited by later adjudications, the rule itself, as applied to cases in which the vendor honestly believed he had a good title, but the title failed for some defect not known to him, and of which he was not chargeable with notice, is now firmly established in the jurisprudence of England by the judgment of the House of Lords in *Bain v. Fothergill*, L. R., 7 Eng. & Ir. App. 158. As already observed, the rule prevails in several of the United States, including this State, under the limitations just mentioned, of good faith and excusable ignorance of the vendor of defects in his title. Indeed these are scarcely limitations, but rather an interpretation of the qualification 'without fraud,' in the opinion by DE GREY, C. J., in the principal case. The rule as it now stands has been applied in this State in *Rich v. Johnson*, 2 Pin. 88; *Blossom v. Knox*, 3 Pin. 262; *Nichol v. Alexander*, 28 Wis. 118; *Messer v. Oestreich*, 52 Wis. 684, and in other cases.

"Under this or any other rule, the plaintiff is entitled to recover the consideration paid by him on account of the purchase. Hence in the present case, whatever may be the measure of damages, the plaintiff should have recovered the amount he advanced for rent, and interest thereon. The reason given by the Circuit judge for excluding this amount from the plaintiff's recovery, to-wit, that he could recover the rent from Uhlig, the tenant under the paramount lease, is conceived to be unsound. The plaintiff did not purchase a term subject to the lease of Uhlig, but an absolute term; and while he might perhaps have treated his lease as an assignment of the rents accruing under the prior lease, and collected the same from Uhlig, there is no rule of law which compels him to do so. Indeed had he done so, it possibly might have operated as a waiver of any claim for damages for the breach of the covenant sued upon.

"The limitations of the rule of *Flureau v. Thornhill*, or rather the exceptions thereto, are well stated in 8 Suth. Dam. 149, as follows: 'Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure to his lessee quiet enjoyment for the term which such lessor assumes to grant; where he refuses, in violation of his agreement, to give a lease, or possession pursuant to a lease, having the ability to fulfill, as well as where the lessor evicts his tenant, he is chargeable with full damages for compensation, and the doctrine of *Flureau v. Thornhill* has no application. On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the

breach for the unexpired term is considered the natural and proximate damages. Where the lessee is deprived of the possession and enjoyment under such circumstances, the lessor is either guilty of intentional wrong, or he has made the lease, and assumed the obligation to assure the lessee's quiet enjoyment, with a culpable ignorance of defects in his title, or on the chance of afterward acquiring one. In neither case has he any claim to favorable consideration, and he is not excused, on the doctrine of *Flureau v. Thornhill*, from making good any loss which the lessee may suffer from being deprived of the demised premises for the whole or any part of the stipulated term.' This quotation doubtless contains a correct statement of the law acted upon in all the States, as well in those which have adopted the rule in *Flureau v. Thornhill*, as in those which have not.

"We are clear that this case comes within the exception. When the defendant leased the store to the plaintiff, he knew that there was a valid paramount lease upon the premises, executed by himself to Wilde & Uhlig, having seventeen or eighteen months to run after the commencement of the plaintiff's term. There is no claim that the former lessees had forfeited their lease. Indeed the defendant afterward made an unsuccessful attempt to evict them by legal proceedings for an alleged breach of the covenants of their lease, occurring after the execution of the plaintiff's lease. But it was held there was no breach. *Munkwitz v. Uhlig*, 64 Wis. 380. These proceedings are in evidence. Hence the defendant knew, when he leased the store to the plaintiff, of a defect in his title which prevented him from assuring to the plaintiff the quiet enjoyment of the leased premises. He thus entered into the contract on the chance of being able afterward to avoid in some way his lease to Wilde & Uhlig, but having no legal cause for avoiding it. These facts deprive him of the protection of the rule in *Flureau v. Thornhill*, and bring the lease within the rule above quoted from Sutherland. In other words, the case is thus brought within the general rule which prevails in actions for breaches of contracts, that the plaintiff shall recover the loss he approximately sustained by reason of the breach.

'But in order to determine what elements of loss come within the general rule, it is necessary to apply other rules of law to the particular case. In the present case (perhaps in most cases) the rules laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 341; 26 Eng. Law & Eq. 398, which have many times been approved by this court, are sufficient. *Shepard v. Milwaukee Gas-light Co.*, 15 Wis. 318; *Hubbard v. W. U. Tel. Co.*, 33 Wis. 558; s. c., 14 Am. Rep. 775; *Candee v. W. U. Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452; *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 30; s. c., 24 Am. Rep. 376; *Hammer v. Schoenfelder*, 47 Wis. 455; *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342; s. c., 41 Am. Rep. 41; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; *McNamara v. Clintonville*, 64 Wis. 207; *Thomas, B. & W. Manufg. Co. v. Wabash, St. L. & P. R. Co.*, 63 Wis. 642; s. c., 51 Am. Rep. 752, see also *Richardson v. Chynoweth*, 26 Wis. 656. See also a very learned and elaborate note on the rule in the principal cases, in which a great number of cases are cited and discussed in 1 Sedg. Dam. 218-234. These rules can best be stated by a quotation from the opinion in the principal case by ALDERSON, B. He says: 'Where

Snodgrass v. Reynolds.

two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.'

"Another rule having its foundation in natural justice should here be stated. In any case of a breach of contract the party injured should use reasonable diligence, and make all reasonable efforts, to reduce to a minimum the damages resulting from such breach. The necessary expenses incurred by him in so doing may be recovered in an action for such breach. This rule was early laid down by this court in *Bradley v. Denton*, 8 Wis. 557, and has been followed since. For a full statement of the rule, and references to numerous adjudications sustaining it, see 1 Suth. Dam. 148. Under this rule, when the plaintiff was informed that the defendant could not give him possession of the store as he had covenanted to do (which information was received by the plaintiff November 7, being eight days before the commencement of his term) it became his duty to use all reasonable efforts to procure another suitable place in which to carry on his business if the damages which otherwise would result from the breach of the defendant's covenant would be thereby diminished. We do not think however the plaintiff could be lawfully required to take another store out of the vicinity in which he was doing business when he took the lease from the defendant. By removing to a remote part of the city, he might, and probably would to some extent at least, have lost the good-will of his business, which it is alleged he had carried on successfully for a series of years in the vicinity of the store No. 411 Broadway. Neither was he required to take another store not reasonably well adapted to his business.

"From the foregoing rules, and the partial application of them already suggested, we think the following propositions are established: (1) The plaintiff is entitled to recover the sum he paid as rent when the lease was executed, and interest thereon; and also the necessary expense of removing some of his goods to the store, with defendant's consent, and taking them therefrom after he failed to get possession of the store. (2) If the defendant did not know, when

he executed the lease, the purposes for which the plaintiff hired the store, or the uses to which he intended to put it, the measure of the plaintiff's damages for breach of the covenant for quiet enjoyment (in addition to the special damages just mentioned), would be that adopted by the trial judge; that is, the difference between the rent reserved in the lease and the actual rental value of the store, without regard to what it is used for, which the jury found to be \$200 per annum. All these are natural and proximate damages resulting from the breach. (3) If the defendant then knew that the plaintiff was carrying on the business stated in the complaint, and hired the store No. 411 Broadway, for the purpose of continuing the same business therein, and if in the exercise of reasonable diligence the plaintiff might have procured another store, reasonably well adapted to his business and in the same vicinity, that is, in a location in which he could have preserved and retained substantially the good-will of his former business, the rule of damages, in addition to the special items first above mentioned, will be the difference between the rent reserved in the lease and the actual rental value of the leased store for the purpose of carrying on such business therein. In such case the actual rental value would ordinarily be measured by the amount of rent the plaintiff would be compelled to pay for another store equally well adapted to his business. If he could obtain another store for the same rent he was to pay the defendant, or less, of course he would suffer no general damages for the defendant's breach of covenant, and his recovery in that behalf would be confined to nominal damages, in addition to the special damages first above mentioned. If however the expenses of removing to another store would have been greater than they would have been in removing to the store No. 411 Broadway, such excess would also be a proper item of damages. (4) If the plaintiff could reasonably have procured another suitable store for his business, he cannot recover for damages to his business, because by leasing, and continuing his business in such other store, he might have avoided such damages. (5) But knowing that the plaintiff hired the store for the purpose of continuing his former business therein (if he did know it), and having executed the lease with the knowledge that he could not put the plaintiff in possession of the store at the stipulated time, because of his prior outstanding lease, the defendant took the risk of the plaintiff being able to procure another suitable store for his business, the inability of the latter to do so would render the defendant liable for the damages resulting to plaintiff's business by reason of the breach of covenant complained of. This is plainly within the rule of *Hadley v. Bazendale, supra*, because under such circumstances the parties may fairly be considered to have contemplated that the breach of covenant would necessarily destroy or greatly impair the value of plaintiff's business. It should be observed, that if the plaintiff recovers for damages to his business, he cannot also recover the value of his lease under the above second or third propositions, because such value is necessarily a factor in estimating the damages to the business. *Smith v. Wunderlich*, 70 Ill. 426 (433). He may however in that case recover the special damages mentioned in the first proposition, for these are not such factors.

"It follows that the testimony which was offered by the plaintiff to show that the defendant knew, when he executed the lease to the plaintiff, that the

Snodgrass v. Reynolds.

latter was carrying on the business before mentioned in the same vicinity, and took the lease of the store for the purpose and with the intention of continuing such business therein, and that he was unable, in the exercise of due diligence, to find another store suitable for his business was competent, and should have been received. Further, after the plaintiff makes a *prima facie* case entitling him to recover for damages to his business, proof should be received under the pleadings to show the value of such business.

"We agree with Mr. Justice PAINÉ, in *Shepard v. Gas-light Co.*, 15 Wis. 818, that to ascertain the value of a business an inquiry as to the profits thereof is necessary. Probable 'value' and 'net profits' are convertible terms as applied to a business. Yet the law in many cases gives damages for breaches of contracts, based on prospective profits, when they are fairly within the contemplation of the parties, are not too remote and conjectural, and are susceptible of being ascertained with reasonable certainty. If the plaintiff shows himself entitled to recover for damages to his business, the character, extent, and value of his established business when the lease was executed, and before, will furnish a guide to the jury in assessing the prospective and probable value thereof had the plaintiff been permitted to transfer it to the store No. 411 Broadway. Carried on in the immediate vicinity of the old stand, and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued.

"It was said in the argument that no case can be found which gives damages for the loss of anticipated profits, because a landlord fails to give possession at the time agreed upon. This is scarcely a correct statement. The case of *Ward v. Smith*, 11 Price, 19, cited by Mr. Justice PAINÉ in *Shepard v. Gas-light Co.*, *supra*, seems to be just such a case. It is conceded that if the plaintiff had not a business already built up and established in the same vicinity, which with its good-will could have been transferred to the store No. 411 Broadway, there would be no basis upon which to estimate the prospective value of the business which the plaintiff would have done there had he obtained possession and carried on the business therein. In such case, profits would probably be too conjectural and uncertain to be the basis of a recovery. Some of the cases refer to this distinction. In *Chapman v. Kirby*, 49 Ill. 211, the court in speaking of the case of *Green v. Williams*, 45 Ill. 206, says: 'In that case the lessee had not entered upon the term, had not built up or established a business, and had not suffered such a loss. There was not in that case any basis upon which to estimate them.' In the present case the offer was to prove facts which would have shown a sufficient basis to determine whether there would be profits, and upon which they might be estimated."

"In *Hughes v. Hood*, 50 Mo. 350, it was held that in an action of damages for withholding possession of leasehold property, where plaintiff had been a non-resident and had removed to this State for the purpose of occupying the premises, he would not be entitled to recover, on the covenant to deliver possession contained in the lease, the amount of his expenses incurred in the removal. The court said: "What connection with this covenant has the plain-

tiffs' place of residence? It so happens that they resided in Indiana and had to remove to Missouri. This did not result from the terms of the contract. It made no kind of a difference where they resided, or how much it cost to remove their families to Missouri. If they had resided in Europe or Asia, or some other remote country, it might have cost them ten times as much to remove here as it did from Indiana. Such considerations are in nowise connected with the contract, and are too remote to be taken by the court or jury as a part of the measure of damages in a case like this.

"I know that the courts have differed in regard to this subject of remote damages. Some of them have allowed such damages, while others have rejected them. We think the better rule is to exclude such damages from the consideration of the jury where they are not provided for by the terms of the contract.

"The true rule of damages in this case was the difference between the rent as provided for in the lease and rental value of the premises. See *Trull v. Granger*, 4 Seld. 115. If the rental value was more than the rent reserved, the plaintiffs would be entitled to recover such difference. The rental value is not what it might be worth to the plaintiffs, but what the premises would rent for in that neighborhood. They might be worth very little to the plaintiffs, or owing to some fortuitous circumstances, they might value them higher than they were really worth."

Sedgwick on Measure of Damages says (p. 140): "As a rule the value of the use of the premises will be the limit of the plaintiff's recovery. Where however the building is let for a special purpose the lessee can recover the value for the purpose. *Heater v. Knox*, 68 N. Y. 561. He cannot recover in addition the profits he would have made in his business."

Damages for injury to business have been allowed in the following cases; School: *Seybert v. Bean*, 83 Penn. St. 450. Lodging-house: *St. John v. Mayor*, 13 How. Pr. 527. Inn: *Glass v. Garber*, 55 Ind. 336. Wood (Landlord and Tenant, § 365), says:

"The rule was formerly to give nominal damages and such mesne profits as the tenant has been compelled to pay, with costs, and nothing for the market value of the term. But a more just and liberal rule is now adopted, and especially where the lessor has been guilty of fraud, or negligence in omitting to prevent an ouster when he had the power to do so, it is held that the tenant may recover the difference between the rent he was to pay and the actual value of the unexpired term, as well as such damages and extra expenses in addition thereto as are the natural results of the breach. Indeed the true rule seems to be, and the one now generally adopted, that the true measure of damages is what the tenant has lost by the breach, and if the circumstances are such as evince fraud on the lessor's part, and of an aggravating character, exemplary damages may also be given." Citing *Dyer v. Whitman*, 66 Penn. St. 425. But the point is not there passed upon except *obiter*. *Ricketts v. Sostetter*, 19 Ind. 125, where it is held that the tenant may recover for deprivation of the use of improvements which he has made; and *Wilson v. Raybould*, 56 Ill. 417, where the tenant was allowed for moving erections made by him, and the rent of another lot similarly situated.

Birmingham & Pratt Mines Street Ry. Co. v. Birmingham Street Ry. Co.

BIRMINGHAM & PRATT MINES STREET RAILWAY CO. v. BIRMINGHAM STREET RAILWAY CO.

(79 Ala. 465.)

Constitutional law — grant by city of railway privilege in streets.

An irrevocable grant, by a city, of the exclusive privilege to construct and operate a street railway, is unconstitutional.

BILL for injunction restraining the construction and operation of a street railway. The opinion states the case. The plaintiff had judgment below.

Hewitt, Walker & Porter and J. M. Van Hoose, for appellant.

Webb & Tillman and R. H. Pearson, contra.

SOMERVILLE, J. The equity of the complainant's bill in this case depends, in our judgment, upon a single inquiry, and that is, whether the municipal authorities of the city of Birmingham were invested by law with the power to make to the appellee, the Birmingham Street Railway Company, an irrevocable grant of the exclusive privilege to construct and operate a street railway over and through certain streets and avenues of that city. If the power to grant such a franchise resided in this municipality, and if the franchise has been lawfully granted, upon a valuable consideration, by an ordinance in the nature of a contract, there can be no doubt either of the jurisdiction or of the duty of a court of equity to protect the invasion of the right, by issuing an injunction to prevent contiguous competition on the part of the appellants, in their efforts to establish an opposition railway company over any of the same streets or avenues previously included in the grant to the appellee. 1 High Inj. (2d ed.), § 902. If however the power in question did not exist, then the grant would be void, so far as it purports to be exclusive in its nature; the bill, in such contingency, is without equity, and the court must be pronounced to have erred in refusing to dismiss the bill for want of equity, and in refusing to dissolve the injunction granted at the instance of the complainant.

Before we proceed to discuss the power of the mayor and aldermen of the city of Birmingham to grant such a franchise, we pro-

Birmingham & Pratt Mines Street Ry. Co. v. Birmingham Street Ry. Co.

pose to first consider the nature of the thing granted, or the character and terms of the franchise itself.

It bears date on the nineteenth day of May, 1882, was duly enacted by ordinance, and purports to be in the form of a regular contract between the subscribing parties. The privilege granted was the exclusive right to construct and operate a street railway, with the necessary side-tracks and turn-outs, over and upon fifteen designated streets and avenues of the city. The only limitation of this grant, in point of time, is the proviso, that it shall not apply to such of said streets and avenues as shall not have been occupied by the grantee within ten years from the date of the contract. The franchise, it will thus be seen, is one not only exclusive in its nature, but in perpetuity, being without limit of duration, except as to an option to exercise it, which was to continue for ten years. When once put in exercise, it purports to last forever. The main consideration, on the part of the grantee, was the agreement to construct one mile of such railway, and to transport passengers at a fare not exceeding five cents from one end of the line to the other. Certain powers of police and regulation are retained to be exercised by the city, not necessary to be mentioned. For all the purposes of this discussion, we shall consider this franchise as a contract between the mayor and aldermen of Birmingham, and the appellee, such as if valid and binding, would be fully protected from violation by both the Constitution of the United States and of this State, each of which instruments prohibits the passage of any laws by State or municipality impairing the obligation of contracts. So we shall consider the contention of the appellee as well taken, that if the grant of this exclusive right be obnoxious to no objection, either on constitutional grounds or for want of the charter power to make it, the obligation of the contract would be impaired by the subsequent grant of a similar franchise to the appellant company to build their competing road over and along the street and avenue included in the appellee's franchise, and embraced in this controversy. *New Orleans Gas Co. v. Louisiana Light Co.*, 15 Wall. 650; *Binghamton Bridge*, 3 Wall. 52.

The contention of the appellants in this case is, that the contract in question, so far as it purports to grant to the appellee the exclusive right to railway privileges over the streets designated, is void for two reasons. First, on the ground that there is no clause in the charter of the city, nor any other law of the general assembly,

Birmingham & Pratt Mines Street Ry. Co. v. Birmingham Street Ry. Co.

which authorizes the making of such a contract; and secondly, because the contract itself is in violation of section 23 of article I of the Constitution of Alabama, which provides, that no law shall be passed by the general assembly "making any irrevocable grants of special privileges or immunities." If either of these positions can be successfully maintained, the exclusive feature of the franchise is without warrant of law, and must of its own weight fall to the ground.

[Omitting the first ground.]

We might stop here with this case, without extending this opinion further. But the principle involved is of such great public importance as to justify, if not require, a consideration of the constitutional objection which is urged to the existence of this right. The argument is further made, that the general assembly is prohibited by the organic law from making such an irrevocable grant, and therefore under no circumstances can it be done by a municipal corporation, which is the mere agency of the State, exercising only derivative powers. The power of the agent, it is said, cannot exceed that of the principal.

Article I, section 23 of the present Constitution of Alabama, provides, that no law shall be passed by the general assembly "making any irrevocable grants of special privileges or immunities."

Section 2, of article 14, reads as follows: "All existing charters, or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the ratification of this Constitution, shall thereafter have no validity."

These provisions occur for the first time in the Constitution of 1875, and have not before been the subject of construction by this court.

What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by the legislature? It seems plain from the very terms used, that the evil intended to be specially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law, and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic. They may now be regarded as relics of governmental folly, rendered

 Birmingham & Pratt Mines Street Ry. Co. v. Birmingham Street Ry. Co.

odious by royal prerogative in the most extravagant periods of the European monarchies. In the strict sense, a monopoly is an exclusive right granted to one person, or a class of persons, of something which was before of common right. A franchise is a special privilege conferred by the State or government upon individuals, and which does not belong to citizens of the country by common right. It has been a common legislative practice to make grants of this kind, and they have led to much and protracted litigation in all of the American courts. Examples of this kind are found in numerous cases where the exclusive privilege has been conferred on favored individuals, and corporations, to manufacture and sell gas in a city; or to supply the inhabitants with water; or to construct a bridge, or run a ferry across a river, between two given points, free from competition within certain limits; or to construct a canal, turnpike, or railroad between certain designated *termini*; or to construct and rent a market-house in a city; or to own and control the only premises which can be lawfully used for the slaughter of live-stock within municipal limits; or in fine as has been done many times in this and other States, to confer on favored corporations an irrevocable exemption from the common burdens of equal taxation, either by exacting from them an inconsiderable *bonus* in commutation of all future taxation; or else exacting from them no taxes at all. The following cases illustrate monopolies of this kind, so often conferred by legislative franchises: *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Binghamton Bridge*, 3 Wall. 51; *City of Chicago v. Rumpff*, 45 Ill. 90; *Slaughter-house Cases*, 16 Wall. 36; *Gale v. Kalamazoo*, 23 Mich. 344; s. c., 9 Am. Rep. 80; *Atlantic City Water-works v. Atlantic*, 39 N. J. Eq. 367; s. c., 10 Am. & Eng. Corp. Cases, 59; *Norwich Gas-light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Mobile R. Co. v. Kennerly*, 74 Ala. 566; *Daughdrill v. Alabama Life Ins. Co.*, 31 Ala. 91; *Home of the Friendless v. Rouse*, 8 Wall. 430. The very fact that the legislature could, according to the better view, make irrevocable grants of this nature, was the very reason, no doubt, why the organic law was made so as to prohibit such grants in the future. In the struggling infancy of States and communities, the temptation has been very great to offer them, as a reward to the investment of capital. The injustice and inequality of their operation have only been illustrated in the light of the rapid increase of our population, the

Birmingham & Pratt Mines Street Ry. Co. v. Birmingham Street Ry. Co.

steady growth of our wealth, and the wonderful discoveries of modern science. It now more fully becomes manifest that they prove iron bands to fetter the growth of public industry, enterprise, and commerce. Free competition in all departments of commercial traffic is justly deemed to be the life of a people's prosperity. The policy of the law, as now declared by our Constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies, which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition. *Case of Monopolies*, 11 Rep. 84.

The exclusive right of the appellee to the privilege claimed, in our opinion, cannot be sustained. The general assembly would itself have no power under the Constitution to make such a grant. *A fortiori*, a mere municipality would have no such power. Nor can we find, upon any proper principle of construction, that it has anywhere been attempted to confer such a power upon the municipal authorities of Birmingham. They had as much right therefore in the exercise of their lawful governmental agency to give their consent to the appellants to construct and maintain a street railway, in the streets and avenues of the city, as they had to grant the same right to the appellee corporation.

These views result in the reversal of the chancellor's decree. He erred in not sustaining the demurrer, and in refusing to dismiss the bill for want of equity. The injunction should have also been dissolved. We will accordingly enter a judgment here ordering the dissolution of the injunction, and will reverse and remand the cause that the complainants may have an opportunity to amend the bill, if practicable, so as to give it equity. This is without prejudice to appellee's right to apply for a new injunction, provided the bill can be amended, so as in the chancellor's opinion, to give it equity, without making an entirely new case. We will not say this is impossible.

Reversed and remanded.

MARKS V. FIRST NATIONAL BANK.

(79 Ala. 550.)

Negotiable instrument — accommodation indorser — fraud.

An accommodation indorser is liable to a holder in good faith, although the indorsement was procured by the maker's fraud in concealing a condition annexed to a prior indorsement.

ACTION on notes. The opinion states the case. The plaintiff had judgment below.

Gunter & Blakely, W. L. Bragg, and Thos. H. Watts, for appellant.

Troy, Tompkins & London, contra.

SOMERVILLE, J. The main question in this case, reduced to its analysis, is simply whether in the case of accommodation negotiable paper, the fraud of the maker, in procuring the signature of an accommodation indorser, is a good defense to a suit brought against such indorser by the payee, who knows the nature of the paper, but is ignorant of the fraud.

We are of opinion, upon fundamental principles of law governing the subject of commercial paper, that the defense cannot be sustained.

1. Accommodation indorsers, beyond all doubt, are liable precisely to the same extent as if they had received value, when the paper upon which their names appear has come into the hands of a holder for value, who has taken it *bona fide*, before maturity, and without notice of any fraud or other equity, which would vitiate it. It is entirely immaterial that such purchaser was cognizant of the fact that the bill or note was founded on an accommodation transaction, and was therefore to this extent without consideration as between the indorser and the maker. The obvious reason is, that the purpose of making the paper was to loan the credit of the accommodation indorser, or other surety to the maker, or the party for whose accommodation the paper is made, that he might obtain money or credit from a third person on the faith of it. Unless this rule prevailed, it is easy to see how the circulation of accommodation paper would be so far frustrated as to destroy its use in commerce. Chitty Bills, 80, 305; 2 Pars. Notes and Bills, 27; *Park Bank*

Marks v. First National Bank.

v. *Watson*, 42 N. Y. 470; s. c., 1 Am. Rep. 573. The rule, in other words, is to use the language of Judge Story, that "the parties to every accommodation bill hold themselves out to the public, by their signatures, to be absolutely bound to every person who shall take the same for value, as if that value were personally advanced to them, or on their account, and at their request." Story Bills, § 192.

This familiar principle is full answer to the argument, that the notes in suit were obtained by the plaintiff from the maker, Fellows, and that this fact charged the plaintiff with a knowledge of the nature of the paper as being of an accommodation character.

[Omitting other points.]

This brings us back to the first inquiry, as to how far the alleged fraud practiced by the maker, whereby he obtained the consent of defendant to become one of his accommodation indorsers, is to affect the payee, who is entirely ignorant of it. The evidence shows that Dawson, the first indorser on the notes, made his indorsement upon the condition, that the maker, Fellows, was to obtain the names of two other responsible indorsers on the paper, before delivering it to the bank, such indorsers to be jointly liable with him. This condition was not communicated to the defendant, and this may be admitted to be a *suppressio veri*, which was a fraud in law. But the plaintiff was as ignorant of the alleged fraud as was the defendant, being an innocent purchaser of the legal title, before maturity, and for value. Why should the bank then be held responsible for a deception in which it had no participation? Its officers trusted to the paper, and the affirmed genuineness of the signatures, which were sufficient on their face to create a legal liability. They placed no special trust in any representations of the maker, as to the nature of the paper. The defendant however trusted the maker, by standing as his surety, and did not either inquire or inform himself as to the terms upon which Dawson had indorsed the notes. One giving currency to commercial paper, by indorsement, is understood, not only to assert the genuineness of all previous signatures, but also "the regularity of all such previous transactions as he was bound to know." 2 Greenl. Ev., § 164. He was guilty of negligence, in this particular; and its consequences should rather be visited on him, than upon one who has parted with value on the faith of his indorsement. *Anderson v. Warne*, 71 Ill. 20; s. c., 22 Am. Rep. 83. Fellows more-

Marks v. First National Bank.

over was, to a certain extent, the agent of the defendant to deliver the note to the bank, without special instructions, and without the imposition of any conditions or terms of delivery. Here again was the reposing of confidence; and the rule is, that where one puts trust and confidence in a deceiver, it is more reasonable that he should be the loser than a stranger, who deals with him without any relations of confidence. The case can scarcely be stronger, than if the notes had been indorsed to be used for some special purpose, and had been fraudulently misappropriated to another purpose by the maker, without knowledge on the part of the payee of such restriction or misappropriation. Yet in such a case it has been often held, that a *bona fide* holder for value can recover of the accommodation indorser, although he knows that the paper is founded on an accommodation transaction. *Merchants' Bank v. Comstock*, 55 N. Y. 24; s. c., 14 Am. Rep. 169; *Quinn v. Hard*, 43 Vt. 375; s. c., 5 Am. Rep. 284; 1 Pars. Notes & Bills, 279, note (n); 2 Pars. Notes & Bills, 27. So it is decided, where a surety fixes his signature after others which are forged, and while it is yet in the hands of him for whose benefit the note is drawn, that this would be no such fraud as would vitiate the paper in the hands of an innocent holder for value, who was not privy to the fraud. *Selser v. Brooks*, 3 Ohio St. 302. In *Helms v. Wayne Agricultural Co.*, 73 Ind. 325; s. c., 38 Am. Rep. 147, where the name of one of the makers of a note was forged, and another signed it as surety only, under the belief that the forged name was genuine, he was held to be bound nevertheless to the payee, who was without notice of the forgery. *A fortiori*, should this be true, in view of the fact that such indorsement is, in a certain sense, a separate and distinct contract with the payee, or holder, by which it is agreed that every indorser severally will pay the debt, if by the use of due diligence it can not be collected from the maker. The case of *Anderson v. Warne*, 71 Ill. 20; s. c., 22 Am. Rep. 83, cited *supra*, is an authority for the proposition, that where a surety is induced by the fraud of the maker to sign a note, this fact constitutes no defense to an action brought by the payee on the note, unless the latter's participation in the fraud is proved; and this principle, we think, is both reasonable and just, at least in cases of commercial paper, which is held by a purchaser for value without notice of the fraud. *Helms v. Wayne Agricultural Co.*, 73 Ind. 325; s. c., 38 Am. Rep. 147; *Farmers &*

 Gilmer v. Mobile and Montgomery Railway Company.

Traders' Bank v. Lucas, 26 Ohio St. 385; 2 Randolph Commercial Paper, § 919.

The principle decided in *Guild v. Thomas*, 54 Ala. 414; s. c., 25 Am. Rep. 703, and *Bibb v. Reid*, 3 Ala. 88, touching the liability of sureties on bonds conditionally delivered, has no application to commercial paper in the hands of an innocent purchaser, and acquired before maturity, and therefore furnishes no rule for our guidance in this case. 1 Dan. Neg. Inst. (3d ed.), § 856; *Deardorff v. Foreman*, 24 Ind. 481; *Guild v. Thomas*, *supra*; 25 Am. Rep. 710, *note*; *First Nat. Bank v. Dawson*, 78 Ala. 67.

There is, in our opinion, no error in the record, and the judgment must be affirmed.

Re-hearing denied.

CLOPTON, J., not sitting.

 GILMER V. MOBILE AND MONTGOMERY RAILWAY COMPANY.

(79 Ala. 569.)

Covenant — running with land.

A covenant by a railroad corporation, in consideration of a grant of the right of way through plaintiff's lands fifty feet wide on each side of the track, to erect a flag station at a point convenient to his house, to permit him to cultivate all the land embraced in the grant which was not needed for use by the railroad company, and if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land, and is binding on an assignee with notice.*

THE opinion states the case. The defendant had judgment below.

Troy, Tompkins & London, and *McDonald & Ferguson*, for appellant.

Watts & Son, contra.

SOMERVILLE, J. The action is one at law for the breach of certain covenants entered into with the plaintiff by the Alabama & Florida Railroad Company, a body corporate, from which the defendant derived title, as assignee, to a strip of land, including the right of way, through the farm of the plaintiff, situated in the

* See note, 57 Am. Rep. 448.

Gilmer v. Mobile and Montgomery Railway Company.

county of Lowndes. In March, 1868, the appellant, who was plaintiff in the court below, conveyed to the said assignor of defendant this right of way and land, extending fifty feet on each side of the center line of the railroad track. In consideration of this grant, the said Alabama and Florida Railroad Company agreed in substance, by a separate instrument, to establish what we may briefly denominate a "flag station" on said land, at a convenient point adjacent to the plaintiff's house, where both passenger and freight trains would stop, upon the giving of proper and usual signals, for the transportation of passengers and certain kinds of produce. The plaintiff was to have the right to cultivate so much of this right of way as may not be needed for use by the railroad, and so long as such cultivation did not interfere with its wants and requirements. It was further stipulated, that in the event of a depot being erected on the premises, the sale of ardent spirits would be strictly prohibited.

It is averred that the defendant corporation derived title by succession from the original vendee and covenantor, with full knowledge of the obligations growing out of the contract.

The Circuit Court sustained a demurrer to the complaint, and dismissed the action, on plaintiff's refusal to amend.

There is an agreement of counsel waiving so much of the demurrer as raises any question touching the plaintiff's right to bring the action in his name, if it would lie at all upon the facts stated. The consideration of this point we therefore pretermitt, assuming that the action was properly brought in the name of the plaintiff as husband, for the use of the wife.

The question for decision is, whether the covenants in question, or either of them, so run with the land, as to be of binding obligation at law upon the defendant, as the assignee of the covenantor.

A covenant is said "to run with land" when the liability to perform it, on the one hand, or the right to enforce it, on the other, passes to the vendee, or other assignee of the land. Such covenant must relate to, or as is more commonly said, "touch and concern the land," and not as merely collateral to it, in order that the assignee of the land may be charged with their benefit or burden. *Spencer's case*, Smith Lead. Cas. 27. They are often called real contracts, because they are annexed or inhere to the reality as part and parcel of it, and "pass from hand to hand with the interest in the realty they are annexed to." 1 Addison Contr., § 430.

Gilmer v. Mobile and Montgomery Railway Company.

And no doubt seems to exist as to the rule, that covenants may run with incorporeal, as well as with corporeal hereditaments, as in the case of tithes and rent charges, which savor of the realty, because they are carved out of and charged on it. 2 Sugden Vend. 482. It is impossible to lay down any fixed rule by which to distinguish in all cases real covenants, which run with land, and are binding as such on heirs, devisees, and assignees, from those which are merely personal, and are binding only on the covenantor and his personal representative. The subject is one full of intricate learning, and the decisions of the courts touching it are greatly conflicting, and far from satisfactory. Among those however which have been decided to follow the realty into the hands of an assignee, are covenants of warranty and for quiet enjoyment, covenants by tenants to pay rent, to repair, maintain fences, reside on the premises, or cultivate the demised lands in a particular manner; not to carry on a particular trade on the premises leased or purchased; not to build on adjacent premises, and many others of an analogous character. Among those adjudged to be personal, and not therefore to touch or concern the land, are covenants made by owners of land between whom and the covenantee there is no privity of title or estate; a covenant not to hire persons of a certain description to work in a mill; or a covenant with a stranger not to permit a grist-mill to be erected on the owner's premises; a covenant by the vendor of lands not to permit marl to be sold from adjoining lands; by a lessee of a house to pay so much for every tun of wine sold in the house; or to buy all beer used by him from his lessors or from his successors in trade. Boone Law Real Property § 317; 1 Add. Cont., § 436; 2 Greenl. Ev., § 240; 1 Pars. Cont. 231-233.

We cite two familiar cases only to illustrate the want of harmony in the decisions. In *Taylor v. Owens*, 2 Blackf. 301; s. c., 20 Am. Dec. 115, the owner of a town site made a lease in which he covenanted that the lessee should have the exclusive right to sell merchandise in the town for ten years. It was held that the covenant did not run with the land, so as to be binding on subsequent purchasers of other town lots from the lessor. In *Norman v. Wells*, 17 Wend. 137, the defendant leased a mill-site to one from whom the plaintiff took by assignment, covenanting not to erect a rival mill on the same stream passing through his, the lessor's land. This was held to be a covenant running with the land, although it was to do some-

Gilmer v. Mobile and Montgomery Railway Company.

thing off the land demised, because it affected its value. It is observed by Mr. Washburn, that "such covenants, and such only, run with the land, as concern the land itself, in whosoever hands it may be, and become united with and form a part of the consideration for which the land, or some interest in it, is parted with between the covenantor and covenantee." 2 Wash. Real Prop. (4th ed.) 286 (16). And this is perhaps a correct principle.

As the class of covenants under consideration are annexed to the realty, and pass with it to the assignee as incident to it, the rule prevails, that there must be some privity of estate or of contract between the plaintiff and the defendant, before a covenant relating to land can be of binding force on the assignee of the covenantor, and that usually the covenantee must have some interest in the land, to which the covenantor's promise may be annexed; otherwise there would be nothing with which the covenant could run, or to which it could adhere as an incident. A distinction is sought to be made, between the burdens and the benefits of such covenants; the assertion being made in the notes to *Spencer's case*, *supra*, that at common law the burden of covenants never runs with land, save where there was a privity of estate between the covenantee and the covenantor—in other words, where there was a conveyance from one to the other—while the benefit might, in all cases, run without such privity or conveyance. 1 Smith Lead. Cas. 127, note. The soundness of this rule may be questioned, and there are numerous cases holding to the contrary; for as said by SELDEN, J., in *Van Rensselaer v. Read*, 26 N. Y. 558, 574, "it has often been held that covenants, both in their benefits and their burdens, run with the land where no tenure, in its strict sense, exists between the parties. But the necessities of the case in hand do not require us to discuss this particular branch of the subject. Here as we shall show, there is a privity of estate between the parties litigant; and that fact brings the case within the rule, that the burdens imposed on the land by the covenantor might follow it into the hands of the defendant as assignee and purchaser.

The question arises, what is the nature of that privity of estate which the law requires in order that the covenants may run with the lands. It is now settled among other rules, contrary to the earlier view of the subject, that the relationship between the parties need not be that of landlord and tenant, although this is clearly sufficient, and presents the most frequent instance of the applica-

Gilmer v. Mobile and Montgomery Railway Company.

tion of the principle. There are well considered cases to be found, where land has been conveyed to vendees, charged with the payment of a perpetual "rent-charge," and the purchasers or assignees from such vendees have been held liable in covenant for the annual rents, and the right to sue has been decided to inure to the assignees of the rent; and this on the principle, that "the common ligament, the estate charged, unites the parties in interest as privies." *Van Rensselaer v. Read*, 26 N. Y. 558. But however this may be, there can be in our opinion no doubt as to the soundness of the principle, that this privity sufficiently exists, if the covenantee retains or acquires an easement, or interest in the nature of an easement, appurtenant to the lands to which the covenant relates; and this whether such easement is acquired by grant or reservation, in either of which modes it may be created. *Bronson v. Coffin*, 108 Mass. 175; s. c., 11 Am. Rep. 335. Such easement is a privilege which the owner of one tenement has a lawful right to enjoy, in respect to that tenement, in or over the tenement of another person; and is usually created by imposing an obligation upon the owner of the servient tenement, in favor of the dominant estate, either to suffer something to be done, or to abstain from doing something, on or about the premises. 4 Kent Com. 419; Washb. Easements, 4-5; *Robbins v. Webb*, 77 Ala. 176; s. c., 68 Ala. 393; *Parsons v. Johnson*, 68 N. Y. 62; s. c., 23 Am. Rep. 149.

We think in this case the plaintiff retained an interest in the land conveyed to the assignor of the defendant, which was in the nature of an easement. He not only imposed a servitude upon the land, by a prohibition against the sale of ardent spirits on the premises, but retained the right to cultivate it under certain conditions and circumstances; thus retaining an interest in the realty which would preserve the privity of estate in it, and to which the covenant of defendant would attach, or become annexed.

A proper application of these principles leads us to the conclusion, that the condition assumed by the Alabama and Florida Railroad Company, the defendant's assignor, by which it was agreed to establish a "flag-station" on the road adjacent to plaintiff's house, and to permit plaintiff to cultivate the land on which the right of way was granted, impose a burden on the land itself, and was not a mere personal covenant. It touched and concerned the land itself, and was not collateral to it, because it was to be performed on it, and affected the value of the adjacent land of the

Gilmer v. Mobile and Montgomery Railway Company.

grantor, being greatly beneficial to it ; and was in the nature of compensation by way of rent for the land conveyed, no other consideration having been paid therefor than that which was confessedly nominal. 1 Smith's Lead. Cas. 22-27, and note, with cases cited. Its performance or non-performance also affected the mode of enjoyment of the granted premises, and their value or quality, so as to render the title acquired by the vendee a subordinate one ; and this is one of the tests by which to decide whether the covenant is inherent in the land itself. 1 Add. Cont., § 435. In other words, the covenant of the vendee "qualified the estate which he took, and attached itself to that estate." *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 ; s. c., 13 Am. Rep. 556. Without consuming time to review the adjudged cases, we refer to the following authorities in support of this conclusion : *Morse v. Aldrich*, 19 Pick. 449 ; *Bronson v. Coffin*, 11 Am. Rep. 335 ; *Wollscroft v. Morton*, 15 Wis. 198 ; *Norman v. Wells*, 17 Wend. 136 ; *Van Rensselaer v. Read*, 26 N. Y. 558 ; *Trustees of Watertown v. Cowen*, 4 Paige, 510 ; 15 Sim. Eng. Ch. 228 ; 1 Smith Lead. Cas. 27, and notes ; *Fulton v. Stuart*, 15 Am. Dec. 542 and notes ; *Webb v. Robbins*, 68 Ala. 293, and 77 Ala. 176 ; *Dorsey v. St. Louis Railroad Co.*, 18 Ill. 65 ; *Southern R. Co. v. Reeves*, 64 Ga. 492 ; *Lypick v. B. & O. Railroad Co.*, 17 W. Va. 427 ; *Norfleet v. Cromwell*, 70 N. C. 636 ; s. c., 16 Am. Rep. 787.

The thing to be done by the covenantor in this case related to the land, and being annexed to it, this assignee, by accepting possession of the land, became bound by the covenant, as one running with the land, without being named in the agreement. *Fulton v. Stuart*, *supra* ; *Taylor Land. & Ten.*, § 437 ; *Spencer's case*, above cited ; *Morse v. Aldrich*, 19 Pick. 446 ; 1 Add. Con. (Morgan's ed.), § 455.

There is a class of cases, unlike the present, in which courts of equity intervene for the establishment and enforcement of easements, whether created by deed or covenant, by assuming jurisdiction in the nature of that for specific performance. These we do not propose to discuss, but merely observe, that equity will enforce easements or servitudes of this nature, against purchasers with notice, as a burden or charge on the servient estate, although the plaintiff could not sue at law upon the covenant creating such servitude ; in other words even though the covenant does not, in the strict sense of the term, "run with the land." *Trustees v.*

Gilmer v. Mobile and Montgomery Railway Company.

Lynch, 70 N. Y. 449 ; s. c., 26 Am. Rep. 615 ; Pom. Eq. Jur. §§ 692, 1303, 1347 ; 3 Para. Cont. 353, note *k*.

The averments of the complaint were sufficiently certain to recover nominal damages for the alleged breach of covenant ; and this would be sufficient on demurrer. We need not therefore discuss the other assignments of error.

The court below erred in sustaining the demurrer to the complaint, and the judgment must be reversed, and the cause remanded.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

GRIMMETT V. STATE.

(23 Tex. Ct. App. 33.)

Criminal law — trial — right to clear court-room.

On a rape trial, where a young female witness was embarrassed and unable to testify on account of laughter in the audience, the court removed from the room all the audience except the officers, attorneys and jurors. *Held*, no error.

CONVICTION of assault with intent to commit rape. The opinion states the facts.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. We find in the record a bill of exceptions as follows: "Be it remembered that on the trial of this cause Annie Grimmett, a witness for the State, being on the witness stand, and under cross-examination, the defendant's counsel propounded the following question to her: 'What did the defendant do after he got on Marietta?' to which question she answered: 'He did what he wanted to, I reckon. I guess you know what he did.' At the answer of the witness the audience laughed, whereupon the court stopped the examination of the witness and ordered the sheriff and his deputies who were present, to remove the audience out of the

court-room and lock the doors and keep the audience out of the room; which order was obeyed by the sheriff and his deputies. The audience was kept out, and the doors kept locked during the balance of the cross-examination of said witness. To which order of the court and act of the sheriff and his deputies, the defendant objected, which objection the court overruled, whereupon the defendant excepted," etc.

Appended to this bill are the following remarks by the trial judge: "I sign this bill of exceptions with the following explanation: The defendant was on trial for a rape charged to have been perpetrated upon a sixteen year old girl, who it was alleged by another witness was raped while in the bed with this witness. Annie Grimmett, the present witness, was only fourteen years old, and is the daughter of defendant. The peculiar case, its necessarily vulgar details, the youth and sex of the witness, and the fact of her being defendant's daughter, taken together, rendered it impossible for her to proceed without embarrassment. Persons in the audience, notwithstanding the efforts of the court and officers, persisted in laughing aloud. In so large an audience it was impossible to distinguish who the laughers were, and equally impossible to suppress their demonstrations, and when the witness burst into tears and said: 'they (the people), had no business here,' the court agreed with her, and directed that the court-room be cleared, which was done, only the attorneys, jurors and officers of the court remaining. Indeed the case could not have been tried without this course being pursued."

We are not informed by this bill of exception upon what ground the defendant objected to the order and action of the court clearing the court-room of the audience. We presume it was upon the ground that the Constitution and the law guaranteed him a public trial. Bill of Rights, § 10; Code Crim. Proc., art. 24.

In treating upon the right of an accused party to have a public trial, Judge Cooley says: "It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases, where from the character of the charge, and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the

trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed, if without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." Cooley Const. Lim. 383. Mr. Bishop, upon the same subject, says: "Publicity does not absolutely forbid all temporary shutting of doors, or render incompetent a witness who cannot be heard by the largest audience, or require a court-room of dimension adequate to the accommodation of all desirous of attending a notorious trial, or vocal organs in counsel or judge capable of reaching all." And he then quotes and adopts the views of Judge Cooley above stated. 1 Bish. Cr. Proc., § 959.

In our opinion the order and action of the court as shown by the bill of exception were not in violation of defendant's right to a public trial. It was very proper, we think, under the circumstances, to exclude from the court-room the principal portion of the audience, not only because of the vulgar and indecent nature of the evidence being developed, but because the audience was disorderly, and it was impossible to discover the particular individuals creating the disturbance, and therefore impossible to conduct the trial in an orderly manner without excluding from the court that portion of the audience in which disorderly conduct was occurring. It was also proper to pursue this course in order to relieve the witness of the embarrassment which the crowd of persons and the disorderly conduct of such crowd occasioned. A reasonable portion of the audience, consisting of attorneys and officers of the court, was permitted to remain in the court-room, and the doors of the court-room were kept closed temporarily only, during the cross-examination of one witness. It is not shown that any person who could have been of any service to the defendant, in his trial, was excluded, or that any injury whatever was done him by the order and acts complained of by defendant. While it is of the highest importance that every right guaranteed an accused person by the Constitution or the law should be carefully and liberally accorded him, we must

Long v. State.

not do violence to reason and justice in construing such rights. We are clearly of the opinion that the defendant was accorded the right of a public trial, and that there was no error in the order and action of the trial judge excluding a portion of the audience temporarily from the court-room.

[Omitting minor matter.]

We find no error in the judgment, and it is affirmed.

Judgment affirmed.

LONG v. STATE.

(23 Tex. Ct. App. 194.)

Criminal law — betting — raffle.

A raffle with dice is a "bet" and a "game."

CONVICTION of betting. The opinion states the case.

Leach & Templeton, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. The indictment charges that the defendant did unlawfully bet and wager at a certain game with dice. It does not allege that any money, or other thing of value, was bet on said game. A motion to quash the indictment because of the want of such an allegation was made and overruled, and counsel for defendant insist that this ruling of the court is error. It is contended, that in view of the language of the act of March 5, 1881 (Gen. Laws, Seventeenth Leg., p. 17), amendatory of article 364 of the Penal Code, the indictment must allege, and the proof must show, that "money or other thing of value" was bet upon the game. Apparently this position is sound.

But when we come to consider the meaning of the word "bet," as defined by our Supreme Court in *Slearnes v. State*, 21 Tex. 692, it will be found that the use of that word in the indictment is equivalent to an allegation that money or other thing of value was staked upon the game. As defined in that decision, a "bet" is the mutual agreement and tender of a gift of something valuable, which is to belong to the one or the other of the contending par-

ties, according to the result of the trial of chance or skill, or both combined. Hence the allegation that the defendant "bet" at the game necessarily includes the averment that the betting was for something of value. If the thing staked upon the result of the game was of no value, there was no "bet" within the legal meaning of that word. It then becomes a matter of proof as to whether there was a "bet." If the proof fails to show that "money or other thing of value" was staked upon the game, no offense against the law has been committed, because there was no "bet" or "wager" upon the game. The question is one of evidence, and not one of pleading, and there was no error in overruling the exceptions to the indictment.

It is shown by the evidence that the defendant and others threw dice in a saloon to determine which of them should become the owner of a rifle gun which had been put up to be raffled for, the value of said gun being \$7. It is insisted by counsel for appellant that this was not a game, but a raffle, such as is not made unlawful by the laws of the State. It is true that our Penal Code does not inhibit a raffle unless the property involved in it exceeds \$500 in value. Penal Code, art. 353. If this prosecution was under that article it certainly could not be held that said article had been violated, because the value of the property involved does not exceed \$500. But the act of March 5, 1881 (Gen. Laws, Seventeenth Leg., p. 17), inhibits betting at any game played with dice or dominoes, unless played at a private residence. Now if a raffle, such as the evidence in this case proves, is a game played with dice, it comes within the inhibition of the new statute, and although it may not have been, and in fact was not an offense under former statutes, it has clearly been made an offense by this new statute. The only question then is, is a raffle, which is determined with dice, a game with dice? This question we must determine with an affirmative answer, as it has been so settled by our Supreme Court. In *Stearnes v. State*, 21 Tex. 692, it is said: "The raffle which is in common use * * * is a game of perfect chance, in which every participant is equal with every other, in the proportion of his risk and prospect of gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances, in proportion to his risk. Whether they be developed with dice or some other instrument is not material. The successful party takes the whole

Curtis v. State.

prize and all the rest lose." Under this definition, and the evidence in this case, we must hold that the defendant did bet money at a game played with dice.

That this new statute, thus construed, embraces raffles or games sometimes used for the purpose of raising money for charitable, benevolent and even religious purposes, we do not controvert. That fact is not entitled to any consideration in ascertaining the meaning of the statute. It was the intention of the legislature, plainly and unequivocally expressed in the statute, to inhibit betting upon any game played with dice or dominoes, not played in a private residence, without regard to the purpose for which such game may be played. If it be the will of the people to legalize such games when used to raise money for charitable, benevolent or religious purposes, it rests with the legislature to so enact.

We find no error in this conviction, and the judgment is affirmed.

Judgment affirmed.

CURTIS V. STATE.

(28 Tex. Ct. App. 237.)

Criminal law — former conviction — bar.

A conviction of an aggravated assault, on an indictment for assault with intent to murder, does not bar a prosecution for murder for the subsequent death of the assaulted party in consequence of that assault.

CONVICTION of murder. The opinion states the case.

Fisher & Townes, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. Appellant was indicted at the July term, A. D. 1886, District Court of Williamson county, for the murder of George Walton, on December 24, 1885. The wound was inflicted on that day, but Walton did not die until April 13, 1886. In the January term of same court, 1886, appellant had been indicted for assault with intent to murder Walton, and was tried at that term on that indictment, and convicted and punished for an aggravated assault. At the July term, 1886, he was placed upon trial on the second indictment, pleaded specially, former jeopardy, former

acquittal and former conviction, and also not guilty. His special plea was found untrue, and he was convicted of murder of the second degree, and his punishment fixed at seven years' confinement in the penitentiary.

The defendant's first three assignments of error, which involve the same principle, are submitted and will be considered together. The question presented by these assignments is well stated in the argument of counsel for defendant as follows: "Does a prosecution upon indictment, in a court having jurisdiction of that offense, for assault with intent to murder, instituted in good faith by the State, and prosecuted to a final determination on the merits, prior to the death of the party injured, which results in a verdict acquitting of all grades of offense higher than aggravated assault, and a conviction of that offense and payment of all penalties denounced, have any effect upon a prosecution for murder, based upon the death of the party, resulting from the identical act of the defendant upon which the former prosecution was predicated?"

In *Johnson v. State*, 19 Tex. Ct. App. 453; s. c., 53 Am. Rep. 385, we held that a conviction of aggravated assault and battery, upon an indictment charging an assault with intent to murder, could not bar an indictment for murder, although the assault and battery was the same act which produced the murder, because at the date of the conviction of the assault and battery, the party assaulted was living, and the offense of murder had not then been completed. In support of this view we cited those standard authors, Wharton and Bishop (Whart. Cr. Pl. & Pr., § 476; 2 Bish. Cr. Law, § 1059), whose texts fully sustain our decision; and in support of their texts they cite a number of decisions, only a few of which we have had access to, but as far as we have examined the cases cited they sustain the texts of those eminent authors. The reason of the doctrine is well stated in a Scotch case by Lord ARDMILLAN as follows: "There never can be the crime of murder till the party assaulted dies; the crime has no existence in fact or law till the death of the party assaulted. Therefore it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death of the injured party. That new element of the injured person's death is not merely a supervening aggravation, but it creates a new crime." *Stewart's case*, 5 Irvine, 310, cited in note to section 1059, 2 Bish. Cr. Law.

Curtis v. State.

We believe this doctrine to be sound in principle and sustained by unanswerable reason. The assault and the murder are not the same offense within the meaning of the words "same offense," as used in the Constitution. If the offense of murder had been completed by the death of the injured party at the time of indictment found, then the assault would be included in the murder, and the State could carve but one offense out of the transaction, and if in such case the indictment be for an assault, a conviction or an acquittal thereunder would be a bar to a prosecution for any grade of homicide. But this doctrine of carving has no application to the case under consideration, because at the time of the first prosecution there was no offense of murder, and the State had no election to carve as between an assault and any grade of homicide. We do not think that this view of the question conflicts with, or in any way infringes upon any provision of our Constitution, for the simple reason that the offense of which the defendant was first convicted or acquitted is not the same offense for which he is being tried, within the meaning of the Constitution and the law the offense for which he is being tried having no existence at the time of said first conviction or acquittal.

Between the *Johnson* case, *supra*, and the one before us there is this difference, Johnson was, upon the second prosecution, convicted of manslaughter only, while this defendant stands convicted of murder in the second degree. It is insisted by counsel for defendant, in a very able argument, that this difference in the cases is very material, in this that the effect of defendant's conviction of an aggravated assault and battery in the first prosecution under the indictment charging an assault with an intent to murder was to acquit defendant of malice, and therefore he could not thereafter be tried for and convicted of murder, because malice is an essential ingredient of murder. That he could only be tried and convicted for a grade of homicide not involving malice. This argument is very plausible, and when first presented it appears to us unanswerable. But on reflection we are satisfied it is specious. A complete answer to it, in our judgment, is that the acquittal of the defendant of the charge of assault with intent to murder was not necessarily a finding by the jury that the defendant was not actuated by malice in committing the assault. The jury may not have been satisfied from the evidence that he committed the assault with a specified intent to kill the injured party, and upon this ground

Leache v. State.

alone may have acquitted him of that offense. This specific intent is as essential an ingredient of the offense of an assault with intent to murder as is malice, while it is not an essential ingredient of murder. Murder may be committed when there is no specific intent to kill the deceased. It is plain to our minds that the verdict of the jury convicting the defendant of an aggravated assault and battery cannot be held to be necessarily an acquittal of the charge that the act was committed with malice aforethought. It was an acquittal of the charge of assault with intent to murder, but it cannot be claimed that it was an acquittal of each and every separate ingredient of that offense. If the jury could not have acquitted him of said offense upon any other ground than the absence of malice on his part in the commission of the act, the position contended for by counsel would be sound, and we would have to hold that defendant could be tried for no higher grade of homicide than manslaughter. These being our views we answer the question propounded by defendant's counsel in the negative and hold that there was no error in the rulings or charge of the court with reference to defendant's special pleas.

[But on other grounds]

Reversed and remanded.

LEACHE V. STATE.

(32 Tex. Ct. App. 379.)

Criminal law — trial — exclusion of witnesses from court-room — insanity — test of — continuance.

Expert witnesses as well as others may be excluded from the court-room, except when testifying, in the discretion of the court.

An irresistible impulse to commit a crime does not excuse if the person knew what he was doing, and that it was wrong.

The continuance of insanity is not presumed.

CONVICTION of murder. The opinion states the case.

Herring & Kelly, N. R. Linulsey, J. C. Jenkins and B. D. Shropshire, for appellant.

J. H. Burts, assistant attorney-general, for State.

Leache v. State.

WHITE, P. J. Appellant was convicted of murder of the second degree for the killing of one J. N. Martin; his punishment being assessed at fourteen years in the penitentiary.

On the trial his defenses, in addition to the plea of not guilty, were, first, resistance to an unlawful arrest by an officer acting without authority of a warrant and when no offense had been committed by defendant, and second, insanity.

Amongst the witnesses summoned by defendant were several medical experts whose testimony he proposed to use on the issue of insanity. In placing the witnesses under "the rule," which had been invoked preliminary to the introduction of the evidence, the court required the medical experts also to be placed under the rule with the other witnesses, over the protest of defendant, who insisted upon his right to have them remain in the court-room so that they might hear all the testimony adduced on the plea of insanity, and be thereby the better enabled to express an opinion upon that issue.

Where "the rule" is invoked as to witnesses, the mode and manner of its enforcement is confided largely to the discretion of the court, and the exercise of that discretion will not be revised except in clearest cases of abuse. *Kennedy v. State*, 19 Tex. Ct. App. 620; *Bond v. State*, 20 Tex. Ct. App. 421; Posey Tex. Crim. Dig. 611, 612. No exception is provided by statute, exempting any particular class of witnesses from the operation of the rule. Code Crim. Pro., arts. 662-666. Ordinarily witnesses who are summoned as experts are excepted from the rule, and in cases involving the question of insanity the better and more satisfactory practice would be to allow them to remain in the room and hear the testimony of all the other witnesses, in order that from the whole testimony they may be enabled to determine from the evidence itself the matter upon which their opinion is desired. *Johnson v. State*, 10 Tex. Ct. App. 571. Mr. Wharton states the rule otherwise, and holds that "when insanity is set up by a defendant and denied by the prosecution an expert cannot be asked his opinion as to the evidence in the case as rendered, not only because this puts the expert in the place of the jury in determining as to the credibility of the facts in evidence, but because the assistance thus afforded is in most trials illusory, experts usually being in conflict, and the duty devolving on the court and jury of supervising the reasoning of experts being one

which can rarely be escaped.' Whart. Cr. Ev., § 418. This whole subject was fully discussed by us in *Webb's case*, 9 Tex. Ct. App. 490, and upon a review of the authorities it was said that "as to medical experts, they may state their opinion upon the whole evidence if they have heard it at all, or upon a hypothetical statement which is in conformity with the whole evidence. All authorities agree that it is inadmissible to permit an expert to give his opinion upon any thing short of the whole evidence in the case, whether he has personally heard it or it is stated to him hypothetically." Citing *Redfield* addition to section 53, Greenl. Ev. Where the expert has not heard the evidence, each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and if meagerly presented in the examination on one side, it may be fully presented on the other, the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted. *Coyle v. Com.*, 104 Penn. St. 117.

In the case in hand it is not shown that the hypothetical method of obtaining the opinion of the experts was either defective in not submitting all the facts essential to an intelligent opinion, nor that the opinions were such as would have been given differently had the evidence been heard directly by these witnesses, and their conclusions drawn from it, and not from a hypothetical statement of it. We cannot perceive that the discretion of the trial judge was abused in the matter to the prejudice of defendant.

Doctor D. R. Wallace, superintendent of the insane asylum at Terrell, Texas, qualified as an expert, and upon the hypothetical statements submitted to him, declared as his opinion that the defendant, at the time of the homicide, was suffering from recurrent insanity. He further stated in effect that had defendant been consigned as insane to his custody, at no time covered by the facts stated would he have felt authorized to release him as a sane man from the asylum.

Appellant's counsel asked this witness if he could give any illustrations of recurrent insanity which had come within his own personal experience. This testimony was objected to by the prosecution and excluded by the court. We have had no access to the authority (*Lawson Expert and Opin. Evid.*) cited in support of the admissibility of the evidence in the brief of appellant's counsel. But even if admissible, in our view of the case its exclusion could not materially affect defendant's rights, and the ruling would be error without

Leahe v. State

prejudice, which is not reversible error. The general rule seems to be that "an expert may be asked by either party as to the reasons on which his opinion is based, or he may with leave of the court, give such explanation on his own account. Beyond this he cannot go in such examination, though he may be examined in details in order to test his credibility and judgment." Whart. Cr. Ev. (8th ed.), § 419.

Many objections are urged to the charge of the court upon the question of insanity, and it is urgently insisted that it was error to refuse defendant's special requested instructions upon the subject. The chief objection is that the court did not instruct the jury to the effect, "that defendant would not be responsible if he was overwhelmed by an impulse which took away his will power and rendered him incapable of controlling his actions." In effect the complaint is that the court did not sufficiently charge upon moral insanity or irresistible and uncontrollable impulse as excuses for crime. As given, the charge of the court upon this branch is almost a literal copy of an approved charge on insanity given in Willson's Criminal Forms (Form No. 716, p. 335), and which is taken from the charge given the jury by the Hon. JOHN C. ROBERTSON, presiding in the trial court in the case of *King v. State*, 9 Tex. Ct. App. 515.

Different courts and different law writers have announced different tests of responsibility for crime where insanity was claimed as a defense to its commission. Mr. Greenleaf's rule is whether the accused was laboring under such defect of reason from disease of the mind as not to know the nature or quality of the act he was doing, or if he did know it, that he did not know that he was doing wrong — the party's knowledge of right and wrong in respect to the very act with which he is charged. 2 Greenl. Ev., § 373. And this seems the rule as recognized in Texas in the early case of *Carler v. State*, 12 Tex. 500, and also in *Webb's* case, 5 Tex. Ct. App. 596; *Williams v. State*, 7 Tex. Ct. App. 163; and *Clark v. State*, 8 Tex. Ct. App. 350.

Mr. Taylor, in his celebrated work on Medical Jurisprudence, speaking of moral insanity, says: "The law does not recognize moral insanity as an independent state; hence however perverted the affections, moral feelings or sentiments may be, a medical jurist must always look for some indications of disturbed reason. Moral insanity is not admitted as a bar to responsibility for civil or crimi-

nal acts except in so far as it may be accompanied by intellectual disturbance." p. 780. From the time of the decision in the noted *McNaughten* case, 10 Cl. & Fin. 200, the English courts have followed the doctrine as the same is announced by Greenleaf, and they have refused to recognize the coexistence of an impulse absolutely irresistible with capacity to distinguish between right and wrong with reference to the act, and in most of the American States the test is still a knowledge of right and wrong. In his work on Homicide, Mr. Wharton says: "Irresistible impulse is not moral insanity, supposing moral insanity to consist of insanity of the moral system coexisting with mental sanity. Moral insanity, as thus defined, has no support either in psychology or law. Nor is irresistible impulse convertible with passionate propensity, no matter how strong in persons not insane. In other words, the irresistible impulse of the lunatic which confers irresponsibility is essentially distinct from the passion however violent of the sane, which does not confer irresponsibility." § 574. A number of most respectable authorities deny that moral insanity has any place in law, and with regard to irresistible impulse they hold, "if it were irresistible the person accused is entitled to be acquitted, because the act was not voluntary and was not properly his act. If the impulse was "resistible" the fact that it proceeded from disease is no excuse at all. Stephen's Cr. L. 91; 1 Whart. Cr. L. (8th ed.), § 145; *McFarland's* case, 8 Abb. Pr. (N. S.) 57; *Fisher v. People*, 23 Ill. 283; *Com. v. Haskell*, 2 Brewst. (Penn.) 491; *Blackburn v. State*, 23 Ohio St. 146; *State v. Gul*, 13 Minn. 341; *Ins. Co. v. Terry*, 15 Wall. 580; *Cane v. Mosher*, 4 Penn. St. 264; *DeJarnette v. Commonwealth*, 75 Va. 867; 4 Crim. Law Mag. 586.

It is held in Oregon that if the accused knew enough to know the difference between right and wrong, and that he was violating the law by the commission of the act, it will not excuse him, although he had surrendered his judgment to some mad passion, which for the time being was exercising a strong influence over his conduct. *State v. Murray*, 11 Oreg. 413; s. c., 6 Cr. L. Mag. 255. Ungovernable passion is not insanity, and one whose power of will is not impaired by disease, and who yielding to passion slays another, is subject to the punishment fixed by law. *Saunders v. State*, 94 Ind. 147.

It is said by the Supreme Court of Alabama: "There is a species of mental disorder, a good deal discussed in modern treatises, sometimes

called 'irresistible impulse,' 'moral insanity,' and perhaps by some other names. If by these terms it is meant to affirm that a morbid state of the affections or passions or an unseating of the moral system, the mental faculties remaining meanwhile in a normal sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition. The senses and mental powers remaining unimpaired, that which is sometimes called moral or emotional insanity savors too much of a scared conscience or atrocious wickedness to be entertained as a legal defense. GIBSON, C. J., in *Commonwealth v. Mosler*, 4 Penn. St. 266, while recognizing the existence of moral or homicidal insanity as 'consisting of an irresistible inclination to kill or to commit some other particular offense,' adds: 'There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance.' With all respect for the great jurist who uttered this language, we submit if this is not almost, if not quite, the synonym of that highest evidence of murderous intent known to the common law, a heart totally depraved and fatally bent on mischief. Well might he add: 'The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary to show by clear proof either its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature.' What is meant by 'evinced itself in more than a single instance,' and how this principle would work in administration, we are left to speculate. Can that be sound legal principle whose general recognition would destroy social order as well as personal safety? We concur with Mr. Wharton (Howe, § 574), that moral insanity which consists of irresistible impulse coexisting with mental sanity 'has no support either in psychology or law.'" *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 20.

And so in *People v. Horn*, 63 Cal. 120, it is held that "an irresistible impulse to commit an act which one knows is wrong or unlawful, if it ever exists, does not constitute the insanity which is a legal defense. Whatever may be the abstract truth, the law never recognizes an impulse as uncontrollable which yet leaves the reasoning powers, including the capacity to appreciate the nature and quality of the particular act, unaffected by mental disease. It cannot be said to be irresistible because not resisted." And in *Wallace v. People*, it is laid down that if an accused has sufficient reason to know right from wrong, it is immaterial whether he had sufficient power of control to govern his actions. 26 How. Pr. 67.

But even in Pennsylvania the doctrine of uncontrollable impulse appears to have been greatly modified, if not repudiated entirely; for we find the Supreme Court of that State, in 1885, announcing, in *Commonwealth v. Taylor*, that "moral insanity is not sufficient to constitute a defense unless it be shown that the propensities in question exist to such an extent as to subjugate the intellect, control the will, and render it impossible for the person to do otherwise than yield thereto. No mere moral obliquity of perception will protect a person from punishment for his act. The jury should be satisfied, with reference to the act in question, that his reason, conscience and judgment were so entirely perverted as to render the commission thereof a duty of overwhelming necessity." A man in the condition thus described would be unquestionably insane to all intents and purposes, in our opinion.

We deduce from the authorities, as a correct general conclusion, that the law does not require as the condition on which criminal responsibility shall follow the commission of crime the possession of one's faculties in full vigor, or a mind unimpaired by disease or infirmity; that the mind may be weakened by disease, or impaired, and yet the accused be criminally responsible for his acts; that he can only discharge himself from responsibility by proving that his intellect was so disordered that he did not know the nature and quality of the act he was doing, and that it was an act which he ought not to do. But that if on the other hand, he had sufficient intelligence to know what he was doing, and the will and the power to do or not to do it, he is, in contemplation of law, responsible for the act he has committed. *State v. Martin*, N. J., reported in 3 Crim. Law Mag. 44; see also *Dunn v. People*, 109 Ill. 635, and 1 Bish. Crim. L., § 391.

Leach v. State.

But let us concede, for the sake of argument, that defendant was entitled in this case to have the doctrine of irresistible impulse and uncontrollable will given in charge to the jury, then we think it is manifest from the following extracts taken from the charge that the law was sufficiently given, and that defendant has no just ground of complaint in the matter. The jury were instructed: "A safe and reasonable test in all cases would be that whenever it should appear from all the evidence, that at the time of doing the act, the prisoner was not of sound mind, but was affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. For in such a case reason would be at the time dethroned, and the power to exercise judgment would be wanting. But this unsoundness of mind or affection of insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment and obliterating the sense of right and wrong, and depriving the accused of the power of choosing between right and wrong as to the particular act done." This portion of the charge is a quotation from the opinion of BREESE, J., in *Hopps v. People*, 31 Ill. 385. Again we copy from the charge: "If it is true that defendant took the life of deceased, and at the time the mental and physical machine had slipped from the control of defendant, or if some controlling mental or physical disease was in truth the acting power within him which he could not resist, and he was impelled without intent, reason or purpose, he would not be accountable to the law. If on the other hand he was of sound mind, capable of reasoning and knowing the act he was committing to be unlawful and wrong, and knowing the consequences of the act, and had the mental power to resist and refrain from evil, his plea of insanity would not avail him as a defense." And yet again the jury were told: "But if the mind was in a diseased and unsound state to such a high degree that for the time being it overwhelmed the reason, conscience and judgment, and the defendant in committing the homicide acted from an irresistible and uncontrollable impulse, it would be the act of the body without the concurrence of the mind. In such a case there would be wanting the necessary ingredient of every crime—the intent and purpose to commit it."

We are of opinion that the charge upon the general doctrine of insanity was sufficiently full, and that it amply submitted the ques-

tion of irresistible impulse and uncontrollable passion, at least as far as we are willing to go in that direction, and therefore there was no error in refusing the special requested instructions.

But again it is insisted that the court erred in the refusal of defendant's special instruction to the effect that the law presumes insanity to continue after once shown to exist. In *Webb's* case, 5 Tex. Ct. App. 596, this court quotes from Mr. Greenleaf that "if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. But this presumption is rather matter of fact than law, or at most, partly of law and partly of fact." 1 Greenl. Ev., § 42.

Doctor Wallace's opinion was that defendant was a subject of "recurrent insanity." "Recurrent" means returning from time to time. Mr. Wharton lays it down as a rule that there is no presumption that fitful and exceptional attacks of insanity are continuous, a proposition manifest in itself. It is only insanity of a chronic or permanent character, which on being proved is presumed to continue. Whart. Cr. Ev., § 730. On the other hand, the rule prevails that where an insane person has lucid intervals, the law presumes the offense of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. 1 Russ. Crimes (9th ed.), top p. 10, s. p. 11; 1 Hale, 33, 34.

In an able article on "Presumptions in Criminal Cases," published in the 1 Crim. Law Mag. Doctor Wharton says: "Supposing however insanity has been proven to exist at a particular time, is it not presumed to continue? So we have been sometimes told, but erroneously. Some diseases which are classed under the general category of insanity are undoubtedly chronic and permanent, and from them recovery is hopeless. From senile *dementia*, and congenital idiocy there can be, as a rule, no recovery. There are few other forms of insanity of which recovery may not be predicated, at least as a contingency, and many forms of insanity, for example, puerperal and climacteric, arising from some peculiar transitional condition of the system, are notoriously temporary. It is a *petitio principii* to say that chronic insanity is presumed to continue; it is untrue to say that temporary insanity is to be considered as any thing else than temporary. The fact is, there is no presumption of law whatever as to the continuance of disease of

McConnell v. State.

any kind. The question is one of experience, to be determined by the character of the disease, taken in connection with the character of the person in whom it acts." Aside from this, the burden is upon the defendant to show that he was insane at the time of and with regard to the particular act, and the presumption of sanity in temporary or recurrent insanity is against him, and must be overcome by him with a preponderance of evidence. Bish. Cr. Proc. 674. It was not error to refuse the special instruction upon this subject.

[Omitting other points.]

Judgment affirmed.

McCONNELL v. STATE.

(22 Tex. Ct. App. 354.)

Criminal law — trial — comments of counsel.

The abuse of counsel's privilege of argument, in order to warrant a new trial, must have been so gross as to prejudice the prisoner's rights. (*See note*, p. 648.)

CONVICTION of manslaughter. The opinion states the case.

Hood, Lanham & Stephens, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. [Omitting other points.] In his closing address the county attorney said: "The defendant in this case has stooped so low as to drag before you on the trial of this cause the infidelity of his dead wife, and publish her before the court-house as a prostitute." We cannot deny that this remark was "unfair." A defendant has a right unquestionably to introduce all such matters of defense as are admissible and calculated to mitigate, excuse or justify his actions, and whilst the prosecuting officer has the right to comment upon the nature and character of such defenses, still in doing so it is most improper to denounce and vilify him on account of his defenses, which often times accused parties are compelled from stress of circumstances unwillingly to interpose, or forced to avail of as drowning men will catch at straws. Counsel representing the State have been admonished time and again of

McCormell v. State.

the injustice and wrong of such practices and the danger they incur in such course of imperilling convictions which would otherwise be irreversible. See Posey Crim. Dig., "Privilege of Counsel." To make vituperation and abuse however grounds for reversing a judgment, it must appear that the remarks indulged in were grossly unwarranted and improper; that they were of a material character and calculated injuriously to affect the defendant's rights. *Pierson v. State*, 18 Tex. Ct. App. 524. Whilst the remark here complained of was reprehensible and unjustifiable, we do not think it should be held so grossly so as to constitute, *per se*, sufficient cause for reversal of the judgment.

[But on other grounds]

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—See note, 56 Am. Rep. 814.

In *Commercial Fire Ins. Co. v. Allen*, Alabama Supreme Court, Jan. 31, 1887, an action on a fire insurance policy, counsel for plaintiffs, in his concluding argument to the jury, said that the ancestry of plaintiffs was well known to counsel, and to every one else who had lived in the community with them; that their honor, integrity, honesty and truthfulness, and that of their descendants, had never been called in question until this soulless corporation, defendant in the case, had charged one of their descendants with falsehood, fraud and misrepresentation. *Held*, objectionable language, and the court's refusal to check it warranted a new trial.

In *Huckshold v. St. Louis, I. M. & S. Ry. Co.*, Missouri Supreme Court, Jan. 31, 1887, counsel said to the jury: "In a case of this kind the law fixed the penalty at \$5,000. What in the name of common sense do railroad companies care for \$5,000? If they want to make issue, what in the name of common sense do they care for that? And yet they have the heart to come here and say that you ought to find a verdict for the defendant, and let the railroad companies kill all the men and boys they please." To this objection was made, but the court declined to interfere. On review the court said: "The trial judge, who had heard the speeches of opposing counsel, and knew what, if any thing, was said to provoke the last remarks of counsel in his closing speech, was in a better position than we are to determine whether he should or not interfere; and as to when, how and to what a trial judge may interfere in any case must depend upon the exercise of a sound discretion, especially so in view of the fact, within the knowledge of every trial judge as well as those who practice before him, that he is closely scrutinized by the jury to discover, if possible, how he inclines to view the evidence; and it is only when it clearly appears that this discretion has been abused that we will interfere."

In *Gulf, etc., R. Co. v. Wallen*, 65 Tex. 568, counsel for the defendant, in his argument to the jury, made use of the following language: "The plaintiff has no right to complain of the railroad company; she jumped from the

McCormell v. State.

"train on account of an alarm given by a Jew drummer, and if it had not been for that everlasting Jew drummer there would have been no trouble. There was no occasion for alarm, and if defendant had not been a corporation, and supposed to have plenty of money, there would have been no suit brought by plaintiff." In the concluding argument for the plaintiff counsel said: "The railroad company is a corporation without soul or conscience, but notwithstanding this, they have got a big pocket, and this you can reach, and if you fail to do it now you may never again have the opportunity. The employees of a company will walk through the train and talk to passengers like puppies; so while you have a chance, teach them the lesson that they cannot be reckless with so valuable a thing as human life." The court observed: "The remarks excepted to in the closing speech of plaintiff's counsel were not authorized by any thing in the record, and in the remarks of opposing counsel, stated as provocation, we fail to discover any justification." But a new trial was granted on another ground.

In *Sasse v. State*, Supreme Court of Wisconsin, March 22, 1887, the district attorney stated to the jury as follows: "The defendant committed a crime in the old country, in Germany, and he fled from justice. He engaged passage in one ship, and then in another. He landed in this country, and went to Philadelphia, committing a crime there. He admitted that he knocked a hole in a man's head in the old country, and by his admission fled and committed a crime in Philadelphia, a crime on one of the citizens of this country." To these remarks to the jury the defendant's counsel objected. The Circuit Court overruled the objection, with the remark: "I suppose the previous history of the defendant may be given, but the fact that he committed one crime is no evidence that he committed this. The court permits the district attorney to proceed as far as to state the previous history of the defendant, with the suggestion however that because he committed one crime it is no evidence that he committed the crime of which he now stands charged." To which ruling the defendant's counsel excepted. The district attorney then proceeded as follows: "He assumed another man's name. He obtained money under false pretenses, and told how he came to commit the crime before stated." The district attorney afterward repeated the remark that "the defendant knocked a hole in a man's head," which was also excepted to. The learned judge before whom the case was tried instructed the jury, in reference to these remarks of the district attorney, as follows: "You will not regard any statement of counsel that the defendant committed a crime in Germany, or that he was a fugitive from justice, or that he came here under an assumed name, all of which things are not in the case." On denying the motion for a new trial in the case, the learned judge remarked as follows: "The district attorney stated in his opening that the defendant had been guilty of some crime in Germany, etc. Whether that be such an error as will reverse the judgment I am not certain. That it was error permitting the district attorney to make the statement I haven't any doubt; but that it was cured I am of the impression. I am disposed to let the Supreme Court pass upon the question." The court on appeal said:

"The language of the learned judge in his instructions to the jury and in these last remarks is here quoted to his credit, as well illustrating his charac-

teristic candor, frankness, fairness, and sense of justice. And it was thought proper that it should be reproduced, to accompany and explain his first ruling upon the remarks of the district attorney in opening the case to the jury. The facts stated by the district attorney would not have been competent or proper evidence if placed before the jury under the sanctions of an oath, and they were much more improper when pressed upon the attention of the jury by the authority of the prosecuting officer of the State, and produced a greater and more lasting effect. These remarks of the district attorney, so grossly improper, unprofessional and unjust, and so repeated and asseverated to the jury, when their minds were entirely free from bias, prejudice, or partiality, when they had no knowledge or opinion of the defendant, or of the merits or demerits of his prosecution, and before they had heard any evidence, and when they were bound to presume him innocent, must have produced an ineffaceable and permanent impression. After hearing the recital of these crimes charged to have been committed by him, and that he was yet a fugitive from justice, their suspicions were aroused, and in their minds the probability of his guilt in the present case was already established, and they were ready and in fit mood to construe every fact and circumstance in the evidence that was afterward produced, and resolve all doubts, against the prisoner at the bar. Then after all the evidence is given, and their opinions were forming, or already formed, whether from the evidence alone, or from the evidence corroborated and strengthened by these terrible charges of the district attorney, they could not tell, and after the court had said in their presence, directly in connection with those charges of previous crimes, 'I suppose the previous history of the defendant may be given,' what avail was it for the court to instruct the jury that they need not regard any statement of the district attorney that the defendant committed a crime in Germany, etc.? They had already regarded it. It was fastened upon their minds, and was mingled with the testimony past the possibility of separation, and it had been weighed, with the testimony, in those nicely-balanced scales which are made so easily to preponderate. The statements had been deliberately made, and they were approved by the court. It was too late, at the end of the trial, to correct the error. Their full effect upon the minds of the jury had been produced in prejudicing them against the prisoner, and unfitting them for an impartial hearing of the evidence and trial of the case. What though they were told by the court that 'the fact that the defendant committed one crime was no evidence that he committed this?' This language of the court came very near sanctioning the charge made by the district attorney, or taking it as true. It was enough that the defendant came before the jury for trial for this crime, already guilty of several other crimes, by the solemn and deliberate statement of this high and impartial officer of the State and of the court. It was impossible that he should have a perfectly fair and impartial trial after this. I never heard of such an opening speech from a prosecuting officer before, and I question if there ever was one so violent and reprehensible. Now that this case is before this court on this alleged error, to sanction it would overrule every previous case decided by this court in which such an error was assigned, and be in conflict with all of the decisions of other courts

McConnell v. State.

upon this question. The remarks of counsel to the jury upon matters outside of the evidence in *Bremmer v. Railway Co.*, 61 Wis. 114, which were deemed in that civil case sufficient error to reverse the judgment, were a thousand times more harmless. In *Brown v. Swineford*, 44 Wis. 262, the remarks were far less objectionable, and they were held of sufficient consequence to reverse an otherwise meritorious judgment. Chief Justice RYAN said in that case: 'It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury, and affect the verdict,' citing *Tucker v. Henniker*, 41 N. H. 317; *State v. Smith*, 75 N. C. 306; *Ferguson v. State*, 49 Ind. 33. A great many similar cases are cited in the brief of the appellant's counsel in that case, and in the brief of the learned counsel for the plaintiff in error in this case, to which reference may be had. For these very objectionable remarks of the district attorney, so approved by the court, we are compelled to reverse the judgment of conviction in this case, and order a new trial.

"After the opening of the case, and when the first witness was called for the State, and did not respond, the district attorney said, in the presence of the jury, 'perhaps somebody has got hold of him;' intimating that some one on behalf of the defendant had tampered with the witness or spirited him away. The court so understood the remark, and reproved the district attorney for making it, saying 'that it did not follow that there is any tampering with the witness because he was absent.' The district attorney thereupon said, 'I will prove it before I get through.' He did not thereafter even offer to prove this charge. He evidently made this unfounded charge to prejudice the defendant's case in the minds of the jury. This may not of itself be such an error as to warrant a reversal of the judgment, but it was grossly improper, and very unfair toward the prisoner, and was wickedly consistent with his preceding unwarrantable and reprehensible assault upon the defendant's previous character."

In *Pence v. State*, Indiana Supreme Court, February, 1887, the court said: "During his closing argument to the jury, the prosecuting attorney referred to the riots in Cincinnati, and the burning of the court-house by a mob, which had occurred recently before the trial. He assigned as a cause for the mob violence, the lax administration of the criminal law in that city. The appellant objected to the reference thus made, and the conclusions drawn. The court overruled the objection. The remarks alluded to above had reference to an historical event, concerning which the jury were supposed to be familiar, both in respect to its occurrence, and the causes to which it was attributed. As there was no allusion made to the defendant in that connection, or to his being in any manner concerned in the riots, we cannot say that the privilege of fair debate was transgressed.

"In his closing argument, counsel for defendant, by way of illustrating the value of certain testimony given on behalf of the State to sustain the general reputation of a witness, said, in substance, that the witnesses did not profess to have any knowledge of the reputation of the witness whose testimony they were called to sustain, and that from the same stand-point, he could personally sustain the general reputation of the defendant. This was made the basis upon which the prosecutor said in argument that he had personal knowl-

McConnell v. State.

edge of the fact that defendant was reputed to be a hotel thief, and that he had been published and portrayed in the *Police Gazette* as such. The speech of the prosecutor went entirely beyond the bounds of propriety in that respect. It cannot be justified. There was a bare shadow of excuse for it in what was said by the defendant's counsel. The remark should have been promptly withdrawn from the jury, and the court should have admonished both the jury and counsel, in no uncertain terms, in respect to their duty in that connection. This was not done. The evidence in the record however fully sustains the verdict of the jury, and there was a shadow of excuse for the remarks. Under such circumstances, we have concluded, after some hesitation, that a reversal ought not to follow. Upon the evidence in the record, it seems to us that a conviction was at all events inevitable, and as the punishment assessed does not seem to have been out of proportion to the offense, we cannot see that there could have been any prejudice to the substantial rights of the appellant. In such a case we are not authorized to reverse."

In *Moore v. State*, 21 Tex. Ct. App. 666, the appellant being on trial for assault with intent to commit rape, the district attorney, in his address to the jury, made use of the following language: "Gentlemen of the jury, a good jury of your county convicted the defendant of the offense with which he is now charged, upon a former and a previous indictment, and his attorneys appealed it to the Court of Appeals upon a trifling technicality in drawing the indictment; and that court reversed the case, and by taking advantage of this trifling technicality, without merit, he has caused your county great expense, which comes out of the pocket of every good tax payer, yourselves among the rest; and now, in view of these facts, I ask you to give him such a term in the penitentiary that will make up for this great expense he has caused upon a mere technicality." A new trial was granted for this, the court observing: "In many decisions this court has urged upon counsel, whose duty it is to prosecute the pleas of the State, to refrain from injecting into trials of cases of this kind any matter calculated to inflame the minds or excite the prejudice of the jury. If we could add any thing to what has been said, or could use any language calculated to reach the minds and consciences of those to whom such admonitions are addressed, we would avail ourselves of the present occasion so to do. As we cannot, we can only reverse and remand the case, in the hope that the accused may secure a fair and impartial trial, according to law and according to those methods, alike ancient and honorable, which still obtain in all enlightened courts."

In *Newton v. State*, 21 Fla. 53, the prosecuting attorney made a statement as to what a witness had told him out of court. The court said: "Instead of calling witnesses to impeach the witness, Cowan, Mr. Wilson makes his statement to the court and jury. 'Statements of fact, not proved, and comment thereon are outside of the cause; they stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel.' In *State v. Underwood*, 77 N. C. 602, the court say: 'We have in some cases ordered a new trial on account of the abuse of privilege by counsel, and will always do so when it seems probable that the defendant has been prejudiced on his trial by such abuse.' In *Jou-*

McConnell v. State.

kins v. North Carolina Ore Dressing Co., 65 N. C. 563, the court uses the following language: 'But still it may be laid down as law, and not merely discretionary, that where the counsel grossly abuses his privilege to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there. And if he fails to do so, and the impropriety is gross, it is good ground for a new trial.' See also *State v. Williams*, 65 N. C. 505.

"The court, it is true, on the interposition of counsel for accused, remarked that counsel could make statements; that they did not amount to testimony unless he took the stand; but there was no direction at any time to the jury that they were not to consider such statements in their deliberations.

"In *Tucker v. Henniker*, 41 N. H. 317, the court well says: 'When counsel are permitted to state facts in argument, and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said in answer to these views that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true, yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force according to circumstances, and if they, in the slightest degree, influenced the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination and irrespective of all those precautionary rules by which competency and pertinency are tested.' See also cases cited in this opinion. *Ferguson v. State*, 59 Ind. 33. The same rule applies to statements made by counsel during the course of the trial. We cannot but see from the evidence in this case, embodied in the record, all of which is circumstantial, that the statements so made by Wilson with reference to the evidence of Cowan may well have had the effect to impair his evidence with the jury, and was therefore not weighed in his favor. It was improperly permitted, and the court should have stopped him from uttering it, and advised the jury then and there that it was to have no weight or effect in their deliberations.

"The ninth error assigned is, 'that the court erred in permitting the State's attorney to argue in reference to the conviction of another person for another murder, as appears from the bill of exceptions.' In the bill of exceptions the following facts appear: 'The State thereupon rested its case, and the defendants offered no evidence or testimony, and in the argument before the jury the State's attorney said: 'because I say, and with all the earnestness with which

McConnell v. State.

I am capable, that there never was to my reading or knowledge a case of circumstantial evidence where every link was so perfect, where the facts were so overwhelming, and when the presumption of guilt was so startling in its conclusions, as in the case before you. If we cannot convict on this testimony, then there is a man under verdict of murder in the first degree, now incarcerated in that jail, who ought to have the door of his prison house opened, and —' By Mr. Foster: 'I object to his stating what is not in the evidence.' By the Court: 'He is only using it as an argument.' By Mr. Foster: 'Well, I except to that style of argument being used.' Mr. Abrams then said: 'I will suppose a case. I say there is the case of Palmer, which the learned writer stigmatizes in the severe language I have read to you — he says of him: 'He was a model of physical health and strength, and was courageous, determined and energetic. No one ever suggested there was a disposition toward madness in him; yet he was cruel, as treacherous, as greedy of money and pleasure, as brutally hard-hearted and sensual a wretch as it is possible even to imagine.' Now you don't find verdicts by comparison with verdicts in other cases, nor am I telling you what the testimony in that case was, but I am only stating to you that if this man were declared innocent no others should be punished.'

"It has been said with truth that the comments and arguments of counsel in the progress of a trial before a jury are controllable in the discretion of the judge who presides; it is however a judicial discretion, and if used to the injury of either, and it so appears properly in the record, an appellate court may and should revise and control it. If the remarks so made by counsel were pertinent in argument they were proper for the consideration of the jury when they have retired to deliberate upon their verdict. His illustrations of the man convicted of murder, now in jail, who should be released, if no conviction was found in this case, and the other of the man Palmer, a supposititious case, were entirely outside of the record and the evidence, and were calculated to prejudice the rights of the accused. The court, in answer to an objection interposed by counsel for accused, said 'he is only using it as an argument,' thus emphasizing the position taken by the State's attorney, and giving it the force and weight of its approval. In *State v. Williams*, 65 N. C. 505, the court say: 'The question is, whether his honor had the power to stop the solicitor for the State, when he was, in the opinion of his honor, abusing his privilege in his comments on a witness and his testimony. It is a power which is usually exercised sparingly; and which ought to be promptly and firmly exercised, when the abuse is gross, as was the case here. It is especially proper to exercise the power in a criminal case, when the State is prosecuting one of its citizens, and should not allow the jury to be improperly prejudiced against him. There is error.'

"In *Jenkins v. N. C. Ore Dressing Co.*, 65 N. C. 563, the court say: 'It may be laid down as law, and not merely discretionary, that when counsel grossly abuses his privilege to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there. And if he fails to do so, and the impropriety is gross, it is good ground for a new trial.' *State v. Underwood*, 77 N. C. 502; *Cable v. Cable*, 79 N. C. 589; *State v. Guy*, 69 Mo. 430;

McConnell v. State.

Proctor v. DeCamp, 83 Ind. 559; *Dickenson v. Burke*, 25 Ga. 225; *Ferguson v. State*, 49 Ind. 83; *Hilliard New Trials*, 225.

"In *Combs v. State*, 75 Ind. 221, in discussing this question of the discretion of the trial court, to be exercised in matters of argument by counsel, the court say: 'To rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and the appellate courts, and it is far better to commit something to the discretion of the trial court than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence, which are likely to do the accused injury, it should be deemed an abuse of discretion, and a cause for reversal, but when the statement is a general one and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal.'

"In the case at bar the remarks of counsel were outside of the evidence and the reasonable bounds of argument. They had no relation to the guilt or innocence of the accused, and were certainly intended to influence the minds of the jury in coming to a conclusion. We can very well see that they may have had such a result. The court, in the exercise of a sound judicial discretion, should have prevented or stopped them or advised the jury that they were not to be considered by them."

In *Hardtke v. State*, 67 Wis. 553, it was said: "On the argument of the cause to the jury, the district attorney said: 'The defendant confessed this crime to me.' To this remark and others the defendant's counsel objected, and excepted, and the record does not show that the court gave it any attention whatever. It is true that the court did not affirmatively rule on this objection of the defendant's counsel, but by its silence the jury might have well understood that the court approved of it, or at least thought that there was nothing objectionable in the remark. It was so clearly not a correct statement of the facts proved that we think it was the duty of the court to have corrected it then and there. It was very material. There had been no evidence of one of the principal ingredients of the crime, and if this statement of the district attorney was accepted by the court and jury as true, it supplied all defects in the testimony, and was a full confession of the crime. With the errors already noticed in this most extraordinary trial, we cannot but think that this omission of the court to correct such a material and important misstatement of the evidence was also erroneous."

TAYLOR V. STATE.

(23 Tex. Ct. App. 529.)

Trial—witness—privately instructing in nature of oath.

A prosecutrix for rape having disqualified herself upon her *voir dire* with regard to her knowledge of the nature and obligation of an oath, the State was permitted to take her to a private office and instruct her thereupon. She was thereupon returned into court, and replying that she then understood the test, was held competent as a witness. *Held, error.* (*See note, p. 658.*)

CONVICTION of assault with intent to commit rape. The opinion states the case.

Plemons, Hazlewood & Templeton, and E. J. Hamner, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. This appeal is from a judgment of conviction for assault with intent to commit rape, the punishment being seven years in the penitentiary. The injured party was the daughter of appellant, and the conviction rests almost exclusively upon her uncorroborated testimony. According to her statements as a witness, appellant had ravished her first some five years prior to the date of the crime for which he was being tried, and she deposed that his crime had been repeatedly perpetrated upon her in the interval between the first and last offense. After the testimony at the trial was closed, the defense demanded that the prosecution be required to elect the precise and specific offense for which a conviction would be claimed, and the prosecution announced that they would claim a conviction only upon the offense as laid in the indictment, to-wit, the one committed on or about the twenty-seventh of December, 1885.

Before her examination as a witness, defendant requested the court to have the prosecutrix tested upon her *voir dire* as to her competency with regard to the nature and obligations of an oath. This was granted, the witness examined in open court, and pronounced incompetent by the judge. Thereupon, at the request of the prosecuting attorneys, and over objection of defendant, the said prosecuting attorneys were permitted to take said witness

Taylor v. State.

from the court-room to the private law office of one of said attorneys, that they might there instruct her properly, in the presence of the sheriff, with regard to the nature of an oath, and read and explain to her the statutes with regard to the crime of perjury and its punishment; after which the witness was again brought back into court, re-examined as to her competency and pronounced competent by the judge, and she then testified in the case. All of which was excepted to by defendant.

Our statutes, while they declare that no person shall be disqualified from giving evidence on account of his religious opinions, or for the want of any religious belief (Bill of Rights, § 20; Code Crim. Proc., art. 12), do hold as incompetent "children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who did not understand the obligations of an oath." Code Crim. Proc., art. 730, subdiv. 2. The method of testing the competency of such witnesses is confided to the discretion of the trial judge, and his determination of the question will not ordinarily be disturbed on appeal, unless an abuse of that discretion is apparent. *Brown v. State*, 2 Tex. Ct. App. 115; *Ake v. State*, 6 Tex. Ct. App. 398; *Brown v. State*, 6 Tex. Ct. App. 286; *Williams v. State*, 12 Tex. Ct. App. 127; *Burk v. State*, 8 Tex. Ct. App. 336.

Was the mode adopted in this instance an abuse of discretion? Mr. Wharton says: "When a child is incompetent simply for want of instruction as to the nature of an oath, the practice has been to postpone the case, so that the child might in the meanwhile be properly instructed." Whart. Crim. Ev. (8th ed.), § 368, citing *Ree v. White*, 1 Leach, 430. This was the English practice. As far as known, it has never been adopted in this country. On the contrary, as Judge Lewis says, in *State v. Scanlan*, 58 Mo. 206, such "practice has been criticised as like preparing or getting up a witness for a particular purpose." s. c., 1 Am. Crim. Rep. 185.

In Indiana, where the witness on a trial for rape was a child only six years old at the time of the trial, and was testifying sixteen months after the alleged offense, the competence of the witness having been challenged, the court examined her, and not being satisfied, appointed two gentlemen who retired with the child to a private room, and after some time returned and reported to the court that in their opinion her testimony ought to be heard,

but received with great allowance, whereupon she was allowed to testify, over defendant's objections; it was held that for this action of the court the defendant was entitled to a new trial. *Simpson v. State*, 31 Ind. 90. In Alabama, where the question was whether the Circuit Court was authorized to arrive at a conclusion respecting the admission or rejection of an infant witness from a private examination after a public examination in court had resulted in the exclusion of the witness in consequence of an apparent defect of knowledge with respect to the obligations of an oath," it was held that it is the court, and not the judge as an individual, which is to determine the competency of a witness; and therefore the examination of the competency of the witness must be made at the trial and in the presence of the prisoner and his counsel. To admit such a witness upon a private examination by the judge is erroneous. Judge GOLDTHWAITE says: "It may be objected it is scarcely possible that an infant of such tender years can be capable of satisfactorily answering questions amid the bustle and confusion of a court-house; but certainly the consequences would be alarming if the admission of such a witness might be affected through the medium of a private examination; and more so when one made in public had proved to be unsatisfactory." *State v. Morea*, 2 Ala. (N. S.) 275. And so in *People v. Welsh*, 63 Cal. 167, it is said, "that a defendant in a criminal case is entitled to have the question of the competency of a presumably incompetent witness heard and determined in his presence, and on his trial before the court and jury." We are clearly of opinion that the procedure here complained of was error.

[Omitting other points.]

Reversed and remanded.

NOTE BY THE REPORTER.—Dr. Wharton wrote to the reporter, as editor of the *Albany Law Journal*, as follows: "In your paper of last week, you cite editorially *Taylor v. State*, Tex. Ct. App. 1886, as condemning the practice of adjourning a trial when a young child is brought up as a witness, so as to enable the child to be intermediately instructed as to the nature of an oath. It may be worth while to notice that in *Com. v. Lynes*, this practice was approved by the Supreme Court of Massachusetts, in a case decided October 23, 1876 (23 Rep. 751). 'In the English practice,' said GARDNER, J., 'it is usual for the judge to examine an infant as to his competency before going before the grand jury, or before proceeding to trial, and if found incompetent for want of proper instruction, in his discretion, to put off the trial in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath.

Rollins v. State.

1 Russ. Crim. Ev. 114; 2 Russ. Crim. Ev. 590; 1 Stark. Ev. (2d ed.) 94; *Rex v. White*, 1 Leach, 430; 2 Bacon's Abr. 577; *Rex v. Milton*, 1 Car. & K. 61; *Reg. v. Baylis*, 4 Cox C. C. 23. The same practice is laid down in Greenl. Ev. (14th ed.), § 866, and cases cited. It is left discretionary with the court, where a principal witness offered is not sufficiently instructed in the nature of an oath, to put off the trial that this may be done.' In the case before the Supreme Court, the trial judge had put off the trial a day to enable the child to be instructed as to the nature of an oath. On the next day, after such instruction, she was received as a witness, being found competent, and this action was approved by the Supreme Court." See *Com. v. Lynes*, 142 Mass. 709; s. c., 56 Am. Rep. 709.

In *State v. Scanlan*, cited in the principal case, the criticism quoted was *obiter*, as no such question was involved; moreover the judge said that the practice of postponing the trial to instruct witnesses is "sanctioned by time-honored precedent.

Greenleaf says (1 Ev., § 367): "That the court will in its discretion put off the trial" in order that the witness may be instructed. Citing English authorities. But in *Reg. v. Nicholas*, 8 C. & K. 246, POLLOCK, C. B., refused to postpone the trial, where the child was wholly ignorant of the nature of an oath, observing that probably more would be lost in memory than gained in religious education, adding that where the intellect was sufficiently matured, but the education had been neglected, a postponement might be proper.

ROLLINS V. STATE.

(22 Tex. Ct. App. 548.)

Criminal law — forgery — what constitutes.

Forgery is predicable of the following instrument: "Apollas & Halsal, please let Mr. G. B. Rollins have 4\$00d. in goods and oblige. Charge to me. Joel Elller."*

CONVICTION of forgery. The opinion states the case.

Johnson & Jenkins, for appellant.

J. H. Burts, assistant attorney-general, for State.

HURT, J. The appellant was convicted for forging the following order addressed to Apollas & Halsal, and purporting to have been drawn by Joel Eller.

* See 55 Am. Rep. 630.

"July 3, 1885.

"Apolas & Halsal, please let Mr. G. B. Rollins Have 4000d. in goods, and oblige. Charge to me.

"JOEL ELLER."

Appellant relies upon three propositions for a reversal of the judgment. 1. The indictment should have been quashed because it did not set out an instrument upon which forgery could be assigned. 2. The court erred in permitting a witness to explain or construe the instrument alleged to have been forged. That the instrument as it was written, and without explanation or construction, must be such as would, if true and genuine, have created, increased or diminished some pecuniary obligation of Joel Eller. That a witness should not be permitted to come into court and translate marks by stating what appellant said they meant; if so, appellant would be tried and convicted of forgery for what he said certain marks meant, and not on the written instrument. 3. A new trial should have been granted because the indictment alleged that the order was forged on Joel Eller, and the instrument bears a different signature.

We are impressed with the belief that a correct solution of the first proposition will dispose of the necessity of considering the others. We have copied above the original instrument, and the question presented is, can forgery be predicated or assigned upon said instrument?

We will state what we understand to be the rules relative to that question.

1. "When the law to which an instrument is subject makes it absolutely and every where inoperative without certain formalities, then falsely to make it without such formalities is not forgery. Thus if certain witnesses are necessary to make a deed or will, falsely making a deed or will without such witnesses is not forgery." Whart. Crim. Law, § 697. "But to further illustrate, if the law forbids the circulation of notes below a certain denomination, this does not release a person from forgery. For the banker may be made liable on such notes, the prohibition going only to a circulation, and there is also a possibility of defrauding third persons." Whart. Crim. Law, § 699.

2. "If the instrument is *prima facie* capable of legal use, it is forgery." Whart. Crim. Law, § 695. "That the instrument in order to make it *prima facie* proof, must appear upon the face of

it to have been made to resemble a true instrument, so as to be capable of deceiving persons using ordinary observation, although those not scientifically acquainted with such instruments may not be deceived." Whart. Crim. Law, § 700. "Whether a particular writing is sufficient, on its face, may be a question of difficulty. If a writing is so far incomplete in form as to have an apparent uncertainty, in law, whether it is valid or not, it does not follow that it may not be the subject of forgery. In such a case, the indictment must allege such extrinsic facts as will enable the court to see that if it were genuine, it would be valid." 2 Bish. Crim. Law, § 545.

Hence we may conclude, that if the instrument appears upon its face to be absolutely void, it cannot be the subject of forgery. But if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery.

In *People v. Hornison*, 8 Barb. 560, Mr. Justice HUBBARD states the rule thus: "The rule seems therefore firmly established that a written instrument, to be the subject of an indictment for forgery, must be valid, if genuine, for the purpose intended. If void or invalid on its face, and cannot be made good by averment, the crime of forgery cannot be predicated upon it."

Now it will not be contended in this case that the order in this case is absolutely void because of the want of formalities required by law. Hence if obscure or of doubtful interpretation by all the authorities it may be made the predicate of forgery by proper allegation of extrinsic matters, or as in this case, by allegations explanatory of words, figures and writing contained in the instrument; which are very admirably drawn in the indictment in this case.

Now we are not to be understood as holding that all instruments, though not absolutely void, can be made the predicate for forgery simply by allegations in the indictment. The instrument, by an inspection of it alone, independent of extrinsic matters or explanatory pleading, must by its very terms, words, figures and marks, appear to be that which by proper allegations it is made to be.

Now how does this instrument impress us? Though vague, uncertain and without form or comeliness, still we are certain that it was intended for an order on Appollas & Halsal for \$4 in goods. And while we might not understand from the instrument itself whose signature was to the order, under the rules above stated this was made plain, and as explained is in harmony with the name to the order.

Orman v. State.

We are of the opinion that the order in question can be and was properly made the predicate for forgery. We are also of the opinion that the court did not err in permitting the State to prove the explanatory allegations in the indictment, this question depending upon the first. Nor did the court err in refusing to quash the indictment.

There being no error in the record the judgment is affirmed.

Judgment affirmed.

ORMAN V. STATE.

(22 Tex. Ct. App. 604.)

Criminal law — privileged communications to attorney.

Communications made by a client to his attorney before the commission of a crime, and for the purpose of being guided or helped in its commission, are not privileged, although the attorney was innocent.*

CONVICTION of murder. The opinion states the case.

T. A. Blair and Herring & Kelly, for appellant.

J. H. Burts, assistant attorney-general, for State.

HURT, J. Appellant was convicted of murder of the second degree and sentenced to the penitentiary for fourteen years, for the killing of W. F. Houghston, in the city of Waco, on the eighth day of September, 1885.

M. D. Herring was called as a witness for the State while he was conducting the defense on the trial of the case, and over objections of defendant, testified, in substance, as follows: Appellant came to my office on the morning of the killing and said he wanted to consult me privately, and requested my law partner, Mr. Kelly, to step into the other room of our office, which he did. Appellant appeared to be intensely excited — more so than I had ever seen him before. I had known him from his childhood. He told me that he had just heard that deceased, Houghston, had been to his, appellant's, saloon and said that his, appellant's, mother and sister were whores, and that they had been cohabiting (he used a vulgar phrase) with

* See note, 36 Am. Rep. 681.

Orman v. State.

negroes, and that they made in that way all appellant had, and asked me what the law was if he killed Houghston. I then read him the statute of the State concerning killing upon the use of insulting words toward a female relative, and I advised him not to have any trouble with Houghston, that he was a trifling, worthless fellow. Appellant then got up to leave, saying that was all he wanted to know, and as he started off, I noticed that his eyes were filled with tears, and I again, and then again, advised him to have no trouble with Houghston, that he, appellant, had had trouble enough; but he paid no attention to me, but went away. Soon after I started out to pay some dues at the T. B. A. office, and while on the street saw a runaway carriage and horses, and immediately thereafter learned that appellant had killed Houghston.

This evidence was objected to because the consultation with witness, and his advice thereon, was privileged, because appellant consulted witness as his attorney and confidential adviser.

Was the evidence of M. D. Herring, under the surrounding facts, privileged communications, and hence not competent?

“Communications from clients to attorneys are privileged on the ground of public policy, with a view to the safe and proper administration of justice. The protection is not qualified by any reference to proceedings pending or in contemplation. It is adopted out of regard to the interest of justice, and from the necessity of free, unrestrained intercourse between counsel and client. It is better in our judgment to adhere to the rule in a broad and liberal sense, than to weaken its force by exceptions.” *Crisler v. Garland*, 2 S. & M. 136.

After a very careful examination of all the authorities accessible to us, we are led to the conclusion that the above rule applies alone to civil cases. What therefore is the rule in criminal cases? In *Queen v. Cox*, decided on December 20, 1884; 14 Q. B. Div. 153; 15 Cox Crim. Cas. 611; 5 Am. Crim. Rep. 140, most, if not all, the English cases bearing upon the question at issue were cited and commented upon by the court. In that case Judge STEVENS wrote a very lengthy opinion, very carefully comparing the decisions which had before been made upon this subject. In a great many cases he gives a concise statement of the facts under which the question was presented, and from his opinion and the cases therein cited we state the following rules:

1. To be privileged the communications must pass between the client and his attorney in professional confidence and in the legitimate course of professional employment of the attorney.

2. If the communications are by the client made to the attorney before the commission of the crime, and for the purpose of being guided or helped in its commission, they are not privileged.

3. Nor does the fact that the attorney was wholly without blame in any particular whatever affect the second rule. We are aware that this third rule is in conflict with quite a number of able opinions, but it is supported by the above case, and we believe by the weight of authority.

Now let us concede (it being in fact absolutely true), that M. D. Herring, the attorney, was wholly without blame, no party in any respect to the homicide, yet was it not the object of the appellant, in his communication with his attorney, to obtain information with respect to a contemplated crime? And did he not obtain such information as would induce rather than prevent him from the commission of the crime? It is true that the advice of the attorney was strongly calculated to prevent the crime, but from the conduct of appellant it clearly appears that he was seeking law and not advice as to what he would do. This it seems to us was very firmly settled in his mind, and especially if the law should be to his liking. For after the statute had been read to him by which he was informed that the killing would be reduced from murder to manslaughter, he seems to have been satisfied, and was willing to kill Houghston and risk such punishment.

Let us suppose that Herring had informed him that he would be guilty of murder of the first or of the second degree, stating to him the punishment for each offense, would it have been as probable that he would have killed Houghston as under the law as truly given to him by Herring? Under the facts surrounding the interview between appellant and Herring, we unhesitatingly answer that it would not. Then under the circumstances attending this interview, it is evident that its effect was to induce (though not so intended by Herring) the appellant to kill Houghston and risk being convicted of manslaughter. This being the effect, the communications between Herring and appellant were not privileged. *Queen v. Cox*, 14 Q. B. Div. 153; 15 Cox Crim. Cas. 611; 5 Am. Cr. Rep. 140, and cases therein cited.

[But on other grounds]

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

TIDWELL V. WITHERSPOON.

(21 Fla. 359.)

Judgment — bar — malicious prosecution — slander.

A judgment for defendant in an action for malicious prosecution is a bar to a subsequent action for slander for the same accusation, although uttered on a different occasion, but previously to the action for malicious prosecution.

SLANDER. The opinion states the case. The plaintiff had judgment below.

J. N. Stripling, for appellant.

F. W. Pope, for appellee.

CHIEF JUSTICE. Witherspoon sued Tidwell in the court below for slander. The declaration contained two counts, one for slander and one for libel.

To these counts the defendant pleaded that the said trespasses, sayings and doings were *res adjudicata* between the parties thereto in the Circuit Court of Madison county on the 9th day of June, 1880, upon a trial thereof before a jury, and that the verdict and judgment of the court thereon were for the defendant. Said suit was for malicious prosecution. The plaintiff replied *nul tiel* record,

and the record being inspected by the court the plea was sustained to the count for libel and overruled as to the counts for slander.

The court should have sustained the plea to all the counts. "In an action for malicious prosecution the plaintiff is entitled to recover damages not only for his unlawful arrest and imprisonment and for the expenses of his defense, but for injury to his fame and character by reason of the false accusation." *Carpenter v. Sheldon*, 4 N. Y. 579. It is the right of every litigant to have his cause once submitted to the arbitrament of the law; when it is there decided the peace of society demands that it should be at rest forever. It is a principle on which the repose of communities depends. "This principle embraces not only what was actually determined but also extends to every other matter which the parties might have litigated in the case." See *Bates v. Spooner*, 45 Ind. 493. The plaintiff in the suit for malicious prosecution could have litigated the same matters that are now, after the suit for malicious prosecution has gone adversely to him, made the cause of a new suit. The slanderous words were spoken of Witherspoon on the 8th day of November, 1878, by Tidwell. December 2, 1878, Tidwell caused the arrest of Witherspoon for doing the act with which he had charged him in the slanderous words uttered on the 8th of November, 1878. Witherspoon afterward commenced a suit against Tidwell for malicious prosecution, which was determined June 9, 1880, in favor of Tidwell. That suit was a bar to any other suit for the same charge, though made on a different occasion, if made before suit brought. *Root v. Lowndy*, 6 Hill, 518; s. c., 41 Am. Dec. 762. The evidence does not show that Tidwell ever spoke the slanderous words at any time after the suit for malicious prosecution was commenced against him by Witherspoon; the slanderous words being the same accusation were necessarily involved in the suit for malicious prosecution, and the determination of that suit concluded Witherspoon's right to bring another suit for slander for words spoken before suit brought. In the case of *Carpenter v. Sheldon*, above, the court say the injury to the character of the plaintiff is in many cases the *gravamen* of the action. "An accusation of crime under the forms of the law or a pretense of bringing a guilty man to justice is made in the most imposing and impressive manner and may inflict a deeper injury upon the reputation of the party accused than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases is by the action

Salomon v. Pioneer Co-operative Company.

for malicious prosecution. The injured party cannot be entitled to two recoveries for the same cause, and a recovery in that form must be a bar to a subsequent action of slander for the same identical accusation."

Appellee has called to our attention the case of *Rockwell v. Browne*, 36 N. Y. 207. This case is unlike the case at bar in this: the slanderous words, although the same words which were used in the accusation which was the cause of the suit for malicious prosecution, were spoken after the termination of the prosecution.

The court sustained the ruling in *Carpenter v. Sheldon*, above, but made the distinction that the utterances of the slanderous words after the prosecution had terminated furnished a new and independent cause of action.

[Omitting minor point.]

The judgment is reversed and the cause remanded with instruction to enter a judgment for defendant.

Judgment reversed and cause remanded.

SALOMON V. PIONEER CO-OPERATIVE COMPANY.

(21 Fla. 574.)

Statute of limitations — "store account."

A statute limiting actions for "any article charged in a store account," applies to wholesale as well as retail stores, wherever situated and without regard to the use of the goods.*

ACTION for price of goods sold. The opinion states the point. The plaintiff had judgment below.

D. L. McKinnon, for appellant.

J. F. McClellan, Liddon & Carter, for appellees.

RANEY, J. [Omitting other points.] The declaration is for the "price and value of goods bargained, sold and delivered by plaintiff at defendant's request in a store account of defendant with plaintiff." The plea is that "the cause of action sued upon was for goods, wares and merchandise purchased by

* See note, 25 Am. Rep. 643.

Salomon v. Pioneer Co-operative Company.

the defendant as a retail merchant, doing business in the town of Marianna, Florida, of the plaintiff as a wholesale merchant in the city of Columbus, Georgia, and the said cause of action did not accrue within two years before the commencement of this action."

Our statute of limitations (§ 10, p. 733, McClellan's Digest), provides as follows: "Actions other than those for the recovery of real property can only be commenced as follows, * * * within three years; * * * An action upon a contract obligation or liability not founded upon an instrument of writing, except an action on an open account for goods, wares and merchandise within two years. * * * *Third.* An action on an open account for goods, wares and merchandise sold and delivered, and an action for any article charged in a store account, shall not be barred until four years." The statute excepts actions on accounts for goods, wares and merchandise from the three-year limitation prescribed by it for actions upon contracts * * * not founded upon an instrument of writing; and then excludes actions for any article charged in a store account from the two-year limitation for an action on an open account for goods, wares, merchandise sold and delivered, and makes the limitation four years. This we think is clear. We cannot strike out as "surplusage" any word of the statute for the purpose of giving it a meaning different from what it has with such word in it. If the word "third" is essential to the meaning the statute has with it in, it is to be presumed that the legislature put it in for the very purpose which its presence subserves. Where then the open account is a store account, no article of goods, wares or merchandise is barred of action in less than four years. In California, the statute, which may have been before the author of our statute when he did his work, provides a limitation of one year for six classes of actions. * * * "*Fifth.* An action on an open account for goods, wares and merchandise sold and delivered. *Sixth.* An action for any article charged in a store account." Wood's Digest, 48. We have been unable to find any decision of the Supreme Court of that State construing the language quoted. A store is defined by Webster as "any place where goods are sold, whether by wholesale or retail," and a storekeeper, he says, is "a man who has the care of a store." Worcester defines the former word as "a building or room in which goods of any kind are kept for sale — a shop for the sale of goods," and the latter word as "one who takes care of a store." "Shop" is defined by Webster as "a

Salomon v. Pioneer Co-operative Company.

building in which goods, wares, drugs, etc., are sold by retail," and by Worcester, as "a place, building or room in which things are sold — a store."

In *Barth v. State*, 18 Conn. 432, when a statute prohibited certain persons from keeping any store, shop or other place for the purpose of selling any wine or spirituous liquors to be drunk thereat the words store and shop were held to be of equivalent import. "Considering," say the court, "the mode of using the words store and shop in this country, and the meaning usually attached to them, especially when they are applied to a place where goods are bought and sold, in which sense they are obviously used in the act, we think they are to be considered in that statute and also in this information, which is in the very words of it as synonymous terms." In view of the above definitions and authorities we do not think we can hold that the word store means merely a retail store, this would be to substitute the word shop for it, and to adopt Webster's definition of shop and ignore the equivalent meaning given the two words by Worcester. There is nothing in the plea denying that the articles sued for are charged in a store account, or as the declaration puts it, "bargained, sold and delivered * * * in a store account." The fact that the defendant does business in the town of Marianna as a retail merchant, and purchased the goods to sell again in his retail store, and the plaintiff is a wholesale merchant in the State of Georgia, does not negative the idea of the goods being charged in a store account. The language of the statute covers any article of goods, wares or merchandise charged and properly chargeable in a store account. The provision is for the benefit of those who have stores, and keep goods therein for sale, and sell them, keeping accounts against the purchasers and relying upon their books of accounts in which the articles are charged as evidence in case of controversy. "A." has a dry goods store, he sells by wholesale, but not by retail; "B." buys from him, has an account at the store, and whatever he buys is charged in the account. "C." has a dry goods store, he sells only by retail; "D." buys from him, has an account at his store, and whatever he buys is charged in the account. Where does the statute draw the line of distinction? The test is not whether the store is one of retail or wholesale, nor in the locality of the store, or the use made of the articles, or the quantity in which they are bought, but is the vendue of goods by a store-keeper and have they been

 Green v. State.

charged in his books in an account against the purchaser? We cannot go outside of the statute and create an arbitrary test as to its meaning. The plea should have expressly alleged that the goods sued for were not charged in a store account.

We do not mean to be understood as saying that there must be an express agreement that the articles shall be charged in the account.

The judgment is reversed and remanded for such proceedings as may be consistent with this opinion and the rules of practice.

Judgment reversed and cause remanded.

 GREEN V. STATE.

(31 Fla. 403.)

Criminal law — bigamy — evidence — proof of former marriage.

On a prosecution for bigamy the former marriage cannot be established by presumptive evidence; there must be proof of an actual marriage.*

CONVICTION of polygamy. The opinion states the case.

S. D. McConnell and Miller & Spencer, for plaintiff in error.

Attorney-general, for defendant in error.

VAN VALKENBURGH, J. In April, 1884, at a regular term of the Circuit Court held in Marion county, the plaintiff in error, John L. Green, was indicted for polygamy. Such indictment charges that on the 16th day of December, 1866, in the county of Marion, John L. Green was married to one Emeline, that on the 28th day of February, 1884, he married one Lizzie Givens, Emeline, his former wife, being then alive, and said Green never having been legally divorced from the said Emeline. The defendant pleaded not guilty. Was tried and found guilty. The defendant's counsel then made a motion for a new trial upon several grounds, among others "because there was no evidence that the defendant was ever married to Emeline." The court overruled this motion and the defendant duly excepted to such judgment and brought

* Contra: *State v. Hughes* (35 Kans. 626), 57 Am. Rep. 195.

Green v. State.

his writ of error to this court. The evidence as appearing in the record before us is as follows: D. S. Dufrees testified: "I know the defendant, a colored man, he came to Florida in 1867. He was then living with Emeline as his wife, a colored woman. He lived with her as man and wife and continued so to live until the — day —, 1884, when he was married to Lizzie Givens. Emeline is still living. I only know he came from South Carolina with her and raised a family of children by her. I also know that she had one child, a mulatto, born before he lived with her. He always treated Emeline and held her out as his wife."

To this evidence defendant's counsel objected as being insufficient to prove the marriage.

The court overruled the objection and defendant excepted. Samuel H. Owens then testified: "I know the defendant. Know him before he came to Florida. He was a slave and also Emeline. They were living together in 1855. He came to Florida in 1857, and since he came here he has lived with Emeline as his wife. He lived with her in South Carolina before he came here and she had several children by him. She had one child, a mulatto, before he lived with her. I don't know whether the father of the child is living or not."

W. A. Wilkinson testified: "I am an ordained minister of the Gospel. I performed the marriage ceremony between John L. Green and Lizzie Givens on the — day of —, 1884."

The defendant offered no witnesses, and the foregoing is all the evidence in the case.

Our statute (McClellan's Dig. 376, § 4), provides that "whoever havi g a former husband or wife living marries another person or continues to cohabit with such second husband or wife in this State shall," etc., be deemed guilty of polygamy and be punished, etc. By section 7, chap. 149, McClellan's Digest, page 753, chap. 1552, Laws 1866, it is provided that "in all cases where colored persons have resided and lived together as husband and wife, and have before the world recognized each other as husband and wife, they shall be deemed and taken to be husband and wife as fully and lawfully as if the marriage had been solemnized by a proper officer legally authorized to do and perform the same, and all children born of such parents are hereby legitimized and made heirs of their parents and capable of inheriting under the laws of this State, as though he, she or they had been born in lawful wedlock."

This statute in no way changes the rule to be applied in this action for polygamy. These parties came into this State subsequent to the passage of that law. At common law cohabitation and repute were always adequate in question of legitimacy, and such proof would be sufficient in most civil actions. In a criminal case however presumptions do not apply. In cases of polygamy it has always been held that in order to convict the defendant, the marriage must be proven by evidence other than of cohabitation and repute. In the case of *Burns v. Burns*, 13 Fla. 369, this court, having this question of the sufficiency of the proof of marriage before them, say in the head-note: "In civil writs generally presumptive evidence, as distinguished from direct evidence of marriage, is *prima facie* sufficient as where a man and woman have cohabited together, speaking habitually to and of each other as husband and wife, and of the time and circumstances of their marriage, and the like; but in suits where criminal conversation, adultery, etc., constitute the essence or foundation of the action, a more rigid rule is required." In the opinion in the same case the court cite and approve from Bishop on Marriage and Divorce, the following: "When parties are living together as husband and wife, the legal presumption, favoring innocence, is that they are persons married to one another, and not persons living in the violation of morality and decency and law. But when the issue to be decided in the case is such as to show that the one against whom it is decided had violated morality and decency and law, if the other party were married to a third person, then no presumption of such marriage can arise simply from cohabitation as husband and wife. In prosecutions for criminal conversation, and upon an indictment for adultery, there must be direct evidence of the marriage, in distinction from presumptive evidence." Such positive evidence is equally necessary upon an indictment for polygamy in order to a conviction. 1 Bish. Marr. and Div., §§ 441, 442, etc.; *Brown v. State*, 52 Ala. 338; *Case v. Case*, 17 Cal. 598; *Clayton v. Wardell*, 5 Barb. 214; 2 Whart. Crim. Law, § 1696; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Clayton v. Wardell*, 4 N. Y. 230.

In this case there is not the semblance of evidence that the defendant was married to Emeline, and consequently that he was guilty as charged in the indictment.

The judgment is reversed and a new trial awarded.

Judgment reversed.

Greeley v. Dixon.

GREELEY V. DIXON.

(21 Fla. 413.)

Assignment for creditors — condition for release — for return of surplus.

An assignment for creditors, with preferences, providing, (1) for the *pro rata* payment of the other creditors in full satisfaction and release, and (2) for the return of any surplus to the assignor, is void on both grounds.*

PROCEEDINGS to test rights to goods. The opinion states the case.

C. P. & J. C. Cooper, for appellant.

Jno. T. & Geo. U. Walker, for appellees.

CHIEF JUSTICE. The appellees, as plaintiff in the court below, sued out an attachment against John W. Howell, which was levied on certain goods in the possession of the appellant, who as assignee of Howell, claimed the goods and commenced proceedings to try the right of property in the goods under section 22, p. 524, McClellan's Digest. On the trial that ensued in the Circuit Court the presiding judge charged the jury that the deed of assignment from Howell to Greeley was void.

The appellant assigns here as errors:

1st. The court erred in giving its charge to the jury, construing the assignment from Howell to Greeley and declaring it void.

2d. That there was error in submitting the cause to a jury and entering a verdict and judgment thereon, when there was no issue joined or traverse of claimants' said affidavit upon which to base a verdict and judgment, because from the case in the record it appears that the jury was sworn to try an issue joined.

3d. The court erred in entering upon the judgment that it did enter, as appears of record, same being for sale of property.

4th. There was error in the verdict and judgment finding the property subject to appellees' attachment.

It is claimed by counsel for the appellees in this court that said deed of assignment is void as to creditors upon two grounds:

1. Because the assignment, after preferring certain creditors, stipulates for a release from the creditors who are to be paid *pro*

* See *Collins v. Davis*, *post*.

rata out of the proceeds of the property assigned after the payment of the preferred creditors.

The language of the assignment on that point is as follows: "To distribute and pay the remainder of said proceeds ratably and in equal proportion to my other creditors in satisfaction and release of all my debts by me owing."

2. That said deed reserves to the assignor any surplus of said proceeds. The language is as follows: "To repay me, my executors and administrators and assigns, the residue of said proceeds, if any there be."

As to the first ground urged the authorities are numerous and conflicting, and counsel have, with commendable industry, brought to our attention a large number of cases bearing on the subject.

The question in this State is an open one.

In *Walters v. Whitlock*, 9 Fla. 87, an assignment was involved which contained a clause of the same legal import as the first above quoted, as to release by creditors of the assignor, but in that case the point was conceded by counsel and the court said. "Here we will remark that it has not been contended by counsel for the appellee that the assignment is not valid," and this question was not passed on by the court.

In England the doctrine that a failing debtor can by deed of assignment of his whole property stipulate therein for a release from his creditors has been uniformly maintained; such stipulations have been held valid even against a claim of the crown. *King v. Watson*, 3 Exch. 6; 5 Eng. L. & E. 431.

The Supreme Court of Rhode Island also sustains these stipulations. See *Nightingale v. Harris*, 6 R. I. 321, and the courts of the following States: Pennsylvania, *Mechanics' Bank v. Gorman*, 8 Watts & Serg. 304, Maryland, *McCall v. Hinkley & Woodward*, 4 Gill, 128; *Kittewell v. Stewart*, 8 Gill, 472. In both these cases however there was a divided court. Alabama, *Rankin v. Lodor*, 21 Ala. 380; Maine, *Fox v. Adams*, 5 Me. 245; Arkansas, *Clayton v. Johnston*, 36 Ark. 406; s. c., 38 Am. Rep. 40. See also *Brashear v. West*, 7 Pet. 615, and *Habrey v. Whiting*, 4 Mason, 206.

The leading case declaring the contrary doctrine is *Grover v. Wakeman*, 11 Wend. 189; s. c., 25 Am. Dec. 624. The court in that case says: "An assignment containing a provision making a preference to certain creditors in the distribution of the assigned property to depend upon the execution by them of a release to the

Greeley v. Dixon.

debtor of all claims against him is void, and being void in part as to creditors is void *in toto*."

In Ohio, *Atkinson v. Jordan*, 5 Ohio, 178; s. c., 24 Am. Dec. 281; North Carolina, *Hafner v. Irwin*, 1 Ired. 490; s. c., 34 Am. Dec. 390; Mississippi, *Robbins v. Embry*, 1 Sm. & Marsh. 208; Missouri, *Drake v. Rogers*, 6 Mo. 317; Georgia, *Miller v. Conklin*, 17 Ga. 430; Texas, *Carlton v. Baldwin*, 22 Tex. 724; Tennessee, *Wilde v. Raulings*, 1 Head, 34, and in Colorado, *Duggan v. Bliss*, 4 Col. 223; s. c., 34 Am. Rep. 80, the principle laid down in *Grover v. Wakeman*, *supra*, is followed. We are inclined to adopt the conclusions and approve the reasoning of the courts which hold stipulations in a deed of assignment requiring a creditor to release his debtor as a condition to participating in the proceeds of his estate, to be void.

It is claimed by the counsel for the appellant that the language used in this assignment, "in satisfaction and release of all my debts by me owing," is not a condition addressed to creditors, but is an instruction to the assignee. Its effect is the same. In the one instance you say to the creditors, you cannot be paid unless you release your debtor, in the other you say to the assignee, do not pay the creditor unless he releases the debtor. In either the creditor is required to release all indebtedness, while only receiving a part of his debt. In the cases above quoted in 7 Peters, 615, and in 4 Mason, 206, Chief Justice MARSHALL, in delivering the opinion of the court in the former case, said: "Yet we are far from being satisfied, that upon general principles, such a deed ought to be sustained," and Mr. Justice STORY, in the latter, said. "While giving effect to the contrary principle from what he understood at that time to be the weight of authority, that if the question had been new and many estates had not been passed upon the faith of such assignments, the strong inclination of his own mind would have been against their validity." It is said in *Burrill Assign.* 267: "The rule is clearly settled against the validity of the stipulations in question, and the decisions in Ohio, Missouri, Mississippi and Georgia, have thrown great weight in the scale." Further, pages 267 and 268: "It is true the Supreme Court of the United States sustained an assignment containing a stipulation for a release, but this was done with marked reluctance, and only because the court felt itself bound by the construction which had previously been given by the courts of Pennsylvania to the statute of that

Jones v. Townsend's Administratrix.

State." Again, "taking into consideration the opinion expressed by Chief Justice MARSHALL, in *Brashear v. West*, *supra*, it seems probable that should a case be brought before the Supreme Court of the United States which could be decided on general principles, and free from the controlling influence of State construction, the decision would be against the right to stipulate."

Mr. Bump says "the doctrine" holding such stipulation void "is supported by the weight of authority." Bump Fraud. Conv. 427.

Counsel for appellees insist also that the clause reserving the surplus to the assignor quoted above vitiates the assignment.

We think, notwithstanding there is some conflict, the weight of authority is against such a reservation when the assignment contemplates a *pro rata* payment to certain creditors contingent upon their releasing him from all indebtedness. In case any of the creditors decline to accept the offer, the portion coming to them would be returned to the assignor. This is a contingency upon the happening of which a part of his estate would be returned to him while he had outstanding unsatisfied debts. Most of the courts that hold that an assignment which exacts a release as a condition to participation in the assignor's estate is valid, hold also that such assignment must convey all the property of the debtor. See cases cited as to the validity of stipulations for release, *infra*, and also Bump Fraud. Conv. 429, 430. There was no error in the charge of the court.

[Minor questions omitted.]

Judgment affirmed.

JONES V. TOWNSEND'S ADMINISTRATRIX.

(31 Fla. 481.)

Libel — privileged publication — candidate for office.

A false publication in a newspaper that a candidate for public office is under indictment for a felony is not privileged. (See note, p. 685.)

LIBEL. The opinion states the point. The plaintiff had judgment below.

Randall, Walkers & Foster and R. B. Archibald, for appellants.

H. H. Buckman, for appellee.

RANEY, J. 1. (a.) The appellants in support of their demurrer to the declaration assert the gravamen of the charge to be that the libel imputed to the plaintiff the commission of a felony and that he had been indicted for such felony, the charge being that he had been, as defendants were informed, indicted for not cancelling the stamps on empty liquor casks, the contents of which he had sold. This charge they contend is not an offense against the State or United States laws.

[Omitting this and other minor questions.]

It is claimed by the appellants that the publication is privileged. The Supreme Court of the United States, in *White v. Nichols*, 3 How. 291, lays down the following conclusions: "1st. That every publication, either by writing, printing or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous is *prima facie* a libel, and implies malice in the author and publisher toward the person concerning whom the publication is made; and that proof of malice can never be required in such cases of the party complaining, beyond proof of the publication itself, but justification, excuse or extenuation must each be shown, if either can be, by the defendant. 2d. That the description of cases, recognized as privileged communications, must be understood as exceptions to the above rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie*, relieves it from that just implication from which the above general rule of law is deduced. The rule of evidence as to such excepted cases is accordingly changed so as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situation of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct." In these excepted cases, as we understand the law, the seeming obligations and relations of the parties standing in them create of themselves in law a presumption that the defendant was not instigated by malice in making the publication, and this presumption must be overcome by the plaintiff. In such excepted or privileged cases malice may exist, but it is not *prima facie* presumed to exist; still it may be shown by the excess of the language used by the defendant, or by other attendant circumstances indicating malice,

and overcoming the presumption naturally obtaining in such excepted cases. *Atwell v. McIntosh*, 120 Mass. 183; *Fryer v. Kennerly*, 15 C. B. (N. S.) 422; 5 E. & B. 528. Malice is implied from newspaper publications the same as from the publication otherwise of similar matter. *Foster v. Scripps*, 39 Mich. 376; *Root v. King*, 7 Cow. 613, 713; *Smart v. Blanchard*, 42 N. H. 137, and *supra*; *Barr v. Moore*, 87 Penn. St. 385; s. c., 30 Am. Rep. 367; *Eviston v. Cramer*, 47 Wis. 659.

We do not think the publication in question privileged though made by a newspaper and of a candidate for office.

Our bill of rights provides that "every citizen may freely speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions or civil actions for libel the truth may be given in evidence to the jury, and if it should appear that the matter charged as libellous is true, but was published for good motives, the party shall be acquitted or exonerated."

The liberty of the press means simply that no previous license to publish shall be required, but not that the publisher of a newspaper shall be any less responsible than another person would be for publishing otherwise the same libelous matter. *Davidson v. Duncan*, 7 E. & B. 229; *Sheckell v. Jackson*, 10 Cush. 25; *Sweeney v. Baker*, 13 W. Va. 182; s. c., 31 Am. Rep. 757; *Eviston v. Cramer*, 57 Wis. 570; *Tilson v. Robbins*, 68 Me. 295; s. c., 28 Am. Rep. 50; *Smart v. Blanchard*, 42 N. H. 137.

On the introduction of the printing press into England it was regarded as a State right, and subject to the coercion of the crown; and was regulated by the king's proclamations, charters and licenses, and star chamber decrees; and it was licensed by the long parliament. Townsh. Libel and Slander, note 3. The press does not possess any immunities or privileges as to publishing libels which are not shared by every individual. *Aldrich v. Press Printing Co.*, 9 Minn. 138. It has no privilege excusing it in printing libels of which any other publication would not be excused. *Foster v. Scripps*, 39 Mich. 376.

In *Root v. King*, 7 Cow. 628, SAVAGE, Ch. J., said: "It has been contended that indulgence should be shown to the defendants as conductors of the press, whose duty it is to communicate to their readers what passes in the legislature, but that their relation to the public is

Jones v. Townsend's Administratrix.

one which takes the case out of the general rule and imposes proof of express malice on the plaintiff. Their right to publish the truth is not questioned, but it is denied that in the capacity of editors of a newspaper they have any rights than such as are common to all. The liberty of the press will not be invaded by requiring the conductors of our presses to stand responsible for the truth of what they publish." Nor, we will add, by requiring them to show the same "good motives" which the bill of rights requires of all. In *Davidson v. Duncan*, 7 E. & B. 231, Lord CAMPBELL said, "in what an unhappy situation the calumniated person would be if the calumny might be published, and yet he could not bring an action and challenge the publishers to prove its truth."

A candidate for office, it is true, puts the character of his fitness, abilities and qualifications for the office, in issue. His conduct and acts, whatever they may be, may be freely commented on and boldly censured. The mere injustice of criticism made of his real acts or conduct is no ground of recovery, whether such harsh criticism be made by a newspaper or by a voter, or other person having an interest in the election; no malice will be implied in such cases. But defamatory assaults on his private character, the publication of falsehood in imputing to him crime or moral delinquency, cannot be justified on the ground of criticism, nor claimed to be privileged, or to be presumed to have been made without malice, but with good motives. In *Root v. King*, 7 Cow. 626, the chief justice said: "I fully subscribe to the doctrine of Chief Justice PARSONS (4 Mass. 169), that when any man shall become a candidate for an elective office, he puts his character in issue with respect to his fitness and qualifications for the office; that publications of the truth on that subject are not libellous, and that the publication of falsehood against public officers or candidates deserves punishment." In *Lewis v. Few*, 5 Johns. 35, THOMPSON, J., said: "It would, in my judgment, be a monstrous doctrine to establish that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crime with impunity. If a man has committed a crime any one has a right to charge him with it, and is not responsible for the accusation, and can any one wish for more latitude than this?" In *Hamilton v. Eno*, 81 N. Y. 116, it is held that the official acts of a public functionary may be fully criticised and entire freedom of expression used in argument, sarcasm and ridicule upon the act

Jones v. Townsend's Administratrix.

itself, and that the occasion will excuse every thing but actual malice and evil purpose in the critic; but the occasion will not of itself excuse an attack upon the character and motive of the officer; to excuse this the critic must show the truth of what he has uttered. To accuse one holding a public office of an offense is not privileged, and if the charge be false the utterer is liable however good his motives, and this although the libel relate to an act of the officer in discharge of his official duties. In *Duncombe v. Daniel*, supra (8 C. & P. 222), the libel was published in a newspaper and reflected on the character of a candidate, and Chief Justice DENMAN said, that although the privileges of electors are large they will not justify the publication of every fact relating to the private character of a candidate. In *Sweeney v. Baker*, 13 W. Va. 182; s. c., 31 Am. Rep. 757, it was held that if a publication be made in a newspaper of a candidate for office with reference to his moral qualifications, which is libellous in its character, the party making such a publication may be held liable therefor, unless he proves the charge made to be true, and it will not in such case be sufficient to prove that the party publishing had good reason to believe and did believe it to be true. From the publication of such libellous charges the law implies malice as well as damages to the plaintiff, and the jury may, upon proof of the publication only, render a verdict for substantial damages.

In *Duncombe v. Daniels*, it is held squarely that the fact that plaintiff was a candidate and the defendant a voter did not bring the case within the rules respecting privileged communications (8 C. & P. 222), and in *Commonwealth v. Clap*, 4 Mass. 163, that publication of the truth concerning the character of a public elective officer, and relating to his qualifications for such office, with intent to inform the people, is not libel, and that the publication of falsehood and calumny against public officers and candidates is a very high offense; and in *Curtis v. Mussey*, 6 Gray, 261, that a discourse delivered pending the canvass for an election of a member of Congress upon the opinion and decision of a commissioner of the United States Circuit Court, remanding a fugitive from service under the fugitive slave law, and containing passages accusing the commissioner of "legal jesuitism," of prejudice and want of feeling, "of a partisan and ignoble act," and comparing him to Pilate and Judas, is not a privileged communication. In *Eviston v. Cramer*, 57 Wis. 570, a newspaper article, stating among other

Jones v. Townsend's Administratrix.

things that it was charged against the plaintiff while holding office of sealer of weights and measures he had made a practice of tampering with the weights of scales in order to swell the fees of the office, was held not to be privileged. In *Rearick v. Wilcox*, 81 Ill. 77, it was held that the fact that the defendant, as the proprietor of a newspaper, in publishing a libellous article against the plaintiff, who was a candidate for office was actuated by what he believed to be for the public good, cannot be taken and considered in mitigation of damages. An intention to serve the public good does not authorize a defamation of private character. "We are aware," says the court, "of no case which goes so far as to hold that private character of a person who is a candidate for office can be destroyed by the publication of a libellous article in a newspaper, notwithstanding the election may be attended with the excitement and feeling that not unfrequently enters into our elections. * * * The law requires the appellee as the publisher of a journal to publish facts, and not libellous articles. The character and reputation of the appellant were as sacred, and as much entitled to protection, when a candidate for office as at any other time." In *Aldrich v. Press Printing Co.*, 9 Minn. 133, libellous matter published against a candidate for a public office is held not to be privileged communication. "We have never supposed that the freedom of speech in this country could be carried to such an extent, yet if such is the law as to an article published in a public journal, there can be no good reason why it does not extend to all channels of communication pending an election." Assuming that the case of *Marks v. Baker*, 28 Minn. 162, is to be taken as in conflict with the preceding case we prefer the rule of *Aldrich v. Press Printing Company*. In *Marks v. Baker*, the libellous article was a discussion of two official reports, between which there was a discrepancy, the plaintiff having failed to charge himself with, but had in fact accounted for, certain moneys. We do not see that a charge of embezzlement was necessary or fair, though there was much to go in mitigation of damages. We consider the doctrine of *Hamilton v. Eno*, 81 N. Y. 116, to be preferable, it too being the case of an official report. In *Palmer v. City of Concord*, 48 N. H. 211, it was held that publications charging an army with cowardice, or with improper treatment of non-combatants, are *prima facie* libellous, and unless justified or excused are punishable by indictment; and that newspaper publications alleging maladministration of public

Jones v. Townsend's Administratrix.

affairs are not libellous by reason of any *prima facie* defamatory matter therein contained, if the publisher, believing upon reasonable grounds that the facts alleged were true, published them in good faith for the purpose of inducing a reform, but if his motive was not a justifiable one, the truth of the facts alleged would not constitute a defense to an indictment for libel. There was nothing in the allegations of maladministration which reflected on the private character or motives of the officers of the general government. "If information given in good faith to a private individual of the misconduct of his servant is privileged, equally so must be a communication to the voters of a nation concerning the misconduct of those whom they are taxed to support, and whose continuance in any service virtually depends on the national voice. To be effectual, the latter communication must be made in such form as to reach the public." We see nothing in the matter of the criticism upon the national administration which is libellous, nor is there any showing of communication to any one not interested. There is nothing in *Crane v. Boston*, 13 Rep. 650, reflecting on the personal character of the plaintiff.

The canon that "a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained criminating matter which without this privilege would be slanderous and actionable," is invoked by appellants. Baron PARKE, in *Toogood v. Spyring*, 1 C., M. & R. 193, said: "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any named limits."

Admitting for the sake of argument that the above legal canon

Jones v. Townsend's Administratrix.

will cover the case of an elector or citizen of a municipality who makes solely to the other electors or citizens or inhabitants and persons happening to be in it at the time, a communication of the kind in question, though false, and places the burden upon the plaintiff to show malice, still this does not cover the case where it is of a candidate for office in such municipality, and is published in a newspaper having the circulation that the defendants' paper is shown to have had. The case of *Toogood v. Spyring* teaches nothing if it does not establish this. There was no necessity for so publishing it. The protection of the privilege may be lost by the manner of its exercise, though the belief in the truth of the charge exist. In *Duncombe v. Daniel*, *supra*, it was claimed that the publication in the *Morning Post* was privileged on the ground that an elector is justified in apprising constituents of any circumstances affecting the character of a candidate, if he *bona fide* believes it to be true. COLERIDGE, J., said: "You must carry the argument further and show that he is at liberty to make the communication to all the world." The express admissions made upon the record as to the circulation of the defendants' newspaper are conclusive against any contention that the communication complained of was made solely to persons having a corresponding interest, or that they did not knowingly publish it to numbers having no interest in the matter, and this, too, without any necessity therefor. Admitting that the subject-matter might have been privileged if made solely to fellow-electors or others in the municipality, the defendants are not relieved of the broadcast publication by the fact that they are publishers of a newspaper. In *Padmore v. Lawrence*, 11 A. & E. 380, there is nothing inconsistent with the above. The defendant, in the presence of a third person, not an officer or a justice, charged plaintiff with having stolen his property, and afterward repeated the charge to another person, also not an officer of justice, who was called in to search such plaintiff with the consent of the latter, and it was held that the charge was privileged if the defendant believed in its truth, acted *bona fide*, and did not make the charge before more persons or in stronger language than was necessary, and that it was a question for the jury and not the judge, whether the facts brought the case within the rule.

In *Davidson v. Duncan*, 7 E. & B. 229 (A. D. 1857), it is held that the publication of matter defamatory of an individual is not privileged because the libel is contained in a fair report in a news-

paper of what passed at a public meeting, and it is said that a fair account of proceedings not *ex parte* in a court of justice is privileged, the reason being that the balance of public benefit from publicity is great and the inconvenience arising from the chance of injury to private character being small as compared to the convenience of publicity, and the proceedings being under the control of the judges, "but it has never yet been contended that such a privilege extends to a report of what takes place at all public meetings. Even if confined to a report of what was relevant to the object of the meeting it would extend the privilege to an alarming extent * * * The legislature may think fit to extend the privilege of publication beyond the limits to which it now goes. If it does it can impose such restrictions on the extension as it thinks fit. We, in a court of law, can only say how the law now stands; and according to that, it is clear the action lies and the plea is bad." Speaking of the privilege, as to judicial proceedings, WIGHTMAN, J., said, "*prima facie* it is actionable to publish a repetition of what is injurious to another, unless justified by truth, or by its being a fair report of what has been said in a public judicial proceeding, not *ex parte*, or it may be in parliament." In *Heurn v. Stowell*, 12 A. & E. 719, it was held that if the publication had been libellous it would not have been justifiable, on the ground that it was promulgated at public meeting called to petition parliament against making a grant in support of a Roman Catholic college. In *Smith v. Higgins*, 16 Gray, 251, the communication was by a voter and tax payer to a town meeting having power to decide on the application of the plaintiffs for a reimbursement; there was no newspaper publication. In *Harrison v. Bush*, 5 E. & B. 344 (1855), the communication praying for a removal from office was claimed not to be privileged because addressed to the home secretary, whereas properly it should have been addressed to the keeper of the great seal. It was held that the above canon applies when the communication is made to a person not, in fact, having such interest or duty, but who might reasonably be, and is supposed by the party making such communication to have such interest or duty, and that though in this case it should have been addressed to the keeper of the great seal, whose advice was generally acted upon in such cases, yet it might be considered as addressed to the queen though the home secretary, who might himself have caused inquiry to be made, have communicated with the

Jones v. Townsend's Administratrix.

keeper, and in effect recommended the removal of the plaintiff. There was no newspaper publication. If we assume a case where the matter is privileged if made to the inhabitants of a municipality having a corresponding interest to that of the person communicating it, and then assume that said person is not the publisher of a newspaper, yet communicates it to a degree equivalent to the circulation of the defendants' newspaper, does not the privilege become entirely lost in the manner of its exercise?

Our conclusion is that the liberty of the press is nowise infringed upon by the rule that when newspapers publish charges imputing crime, or moral delinquency, to candidates for elective offices, the publishers should previously see to their correctness. Moreover we do not recognize the moral obligation upon the publisher, whatever may be the candidate's want of mental or other qualifications for office, to publish contrary to the fact that he is under indictment for a felony or to otherwise assail his private character or impute moral delinquency to him. It is enough to permit him to show all circumstances indicative of a less degree of malice, and in mitigation of damages.

Considering all the testimony in this case, we are unable to say that a communication of qualified privilege throwing the burden on the plaintiff is shown; nor does the declaration upon its face make a case of such privilege. *Enslow v. Cramer*, 47 Wis. 669.

What we have said is sufficient without going specially over each of the numerous exceptions. The verdict must be set aside, the judgment is reversed and the case remanded for such proceedings as may be proper.

Judgment reversed and case remanded.

NOTE BY THE REPORTER.—See 57 Am. Rep. 214, and note, 222.

In *Hamilton v. Eno*, 81 N. Y. 116, approved in the principal case, the plaintiff, who was assistant sanitary inspector of the board of health of the city of New York, in the discharge of his duties made a report to the superintendent of the health department, wherein as is stated in the complaint, he "highly commended the pavement made and furnished by the Grahamite Pavement Company as a pavement of great excellence," giving statistics, etc. This report was published in the "*City Record*," the official paper of the city. Defendant thereupon wrote a letter, which was published in the "*Tribune*," containing the following in relation to plaintiff and his report: "A young assistant inspector of the board of health by the name of A. McLane Hamilton has thought it worth while to look outside of the district assigned him, and to write to his superior officer in the health board a letter recommending the

Jones v. Townsend's Administratrix.

Grahamite pavement. This letter, it would appear, was written under the dictation of the Grahamite Pavement Company, or without a full inquiry into the merits of the subject. What object there was in the production of this letter it might be difficult to learn. It is understood that the stock of the Grahamite Company has been placed 'where it will do the most good,' and the name of at least one officer of the city government can be given who, on taking official position, where it was supposed he might have to advocate or oppose this pavement, returned to the company stock which had been presented to him. When such an example is known, those who step aside from the strict line of duty, to advocate something outside of their proper official sphere, cannot feel aggrieved if their action is looked upon with suspicion." The court, FOLGER, C. J., said: "The occasion that makes a communication privileged is when one has an interest in a matter, or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another who has a like interest or duty, or to whom a like propriety attaches to hear the utterance. *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Klinck v. Colby*, 40 N. Y. 427; s. c., 7 Am. Rep. 360; *Sunderlin v. Bradstreet*, 46 N. Y. 191; s. c., 7 Am. Rep. 822. And in a qualified way, the occasion exists when there has been put forth a publication of general public interest, or the publication thus made in itself is one to which public interest has been invited. Then there is a right to make comment upon that publication. And like to this are the acts and conduct of public functionaries, and of course their official productions, when made public by themselves or in the due course of the public business.

"We think that the occasion of the defendant's publication was such as that first stated. The plaintiff had made an official report recommending a certain kind of street pavement. It was calculated to make public favor for that pavement. The official character of its author, which was impressed upon the report, made it more important and effective. If the municipal authorities should be led to adopt it, by the public favor shown to it, or the public demand for it, and use it upon the streets, that action would be at the cost of property owners, and to the public good or ill. The official report tending to this result was spread before the community in a public journal, and the common attention drawn to it. Every citizen had a right to discuss the question as publicly as the report had done so. So that the time and mode of the publication of the defendant made the occasion of it thus far privileged. Such an occasion must however be used fairly and in good faith, with a view to the public interests and good, and without evil or malicious motive. In the case in hand, there was the report of the plaintiff, and it was his report made officially. It was therefore the subject of criticism as a work upon a matter of public interest, and also as the act of an official person. As a work, the defendant might question its statements of fact and deny them; he might expose misrepresentations and point out errors; he might combat its reasoning and show its conclusions ill drawn; and he might do so with satire and ridicule, so long as he directed those missiles at the report and the contents of it. But he could not attack the private character of the author; to do so would be libellous. *Cooper v. State*, 24 Wend. 442. Now it did not affect

Jones v. Townsend's Administratrix.

the report or its merits, so far as the author was concerned as a private person, that he wrote what was dictated to him by the Pavement Company. As a private person, he had a right to put in writing whatever the officers of that company told to him. It would not have affected it or its merits in such case, if he had received a reward from that company for what he wrote. As a private person, he had a right to take pay for the exercise of his literary ability. And to say, concerning a printed publication, that the author of it wrote it as he was told to do by one having an interest in the effect to be produced by it, and had a recompense from that one therefor, would not impute moral dereliction nor venality, and would be no more than a fair mode of lessening the weight of the statements of fact and parrying the force of the reasoning.

"It is therefore with the report as an official act, and with its author as a public servant, that we are principally concerned. It is apparent that to say of such a matter from such a person that its statements were dictated by interested persons, and that the author was rewarded for it from their private means, is calculated to injure the official and private reputation of the author. Now one may in good faith publish the truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefor, however good his motives. A person in public office is no less to be protected than one who is a candidate for public office; and the law of libel must be the same in each case. The public have as much interest in knowing the true character of one who is seeking a place of trust as that of one who holds it. There must be as much and no more privilege of utterance as to one than the other. Yet it is the law of this State that to accuse a candidate for public office of an offense is not privileged, though the charge was made without evil motive, and in the exercise of a political right (*Lewis v. Few*, 5 Johns. 1); and though the libel relate to the public act of the candidate in his official place. *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613, affirmed on error brought, 4 Wend. 113. It cannot be different when the charge is against one holding an office. See *Edsall v. Brooks*, 17 Abb. Pr. 221. So it seems to be in other States. *Com. v. Clapp*, 4 Mass. 163; *Curtis v. Mussey*, 6 Gray, 261; *Seely v. Blair*, Wright (Ohio), 358, 683; *Brewer v. Weakley*, 2 Overton (Tenn.), 99; *Mayrant v. Richardson*, 1 Nott & McCord, 347. It is not needful that we go into an examination and discussion of the English decisions cited to us in behalf of the appellant, and many others that may be found in the English books. Were they uniform and consistent in stating a rule different from that to be found in the reports of our own State, we would not be at liberty to follow them. When it is doubtful if on the whole and after due comparison and collation, they do not assert the same principle as our own decisions, still less need we take time in reviewing them.

"We are of the opinion that the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm and ridicule upon the act itself; and that then the occasion will excuse every thing but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that to be excused, the critic must show the truth of what he has uttered of that kind."

Jones v. Townsend's Administratrix.

In *Express Printing Co. v. Copeland*, 64 Tex. 354, the plaintiff was a candidate for mayor, and the libel complained of charged him as follows: "In 1881, T. P. Aplin died, and Mr. Copeland was appointed administrator of his little estate, the total valuation of which was \$2,579.90. The administration was closed November 23d, and the report shows a total expense of administering on the estate of \$2,579.90, to have been \$862.28, and the administrator was allowed to retain the balance of the estate, \$1,777.62, subject to the order and instructions of the heirs. What such retention cost the heirs we do not know, but from the charges of administration, it was doubtless a pretty heavy sum. The heirs, no doubt, were afraid to give any instructions through fear that the balance of the estate would not pay the fees accruing for the money left in the administrator's hands." The court set aside a verdict for plaintiff, observing: "With respect to the question of privilege asserted by the answer, there is considerable confusion found in the adjudicated cases. Judge Cooley, in his work on Torts, page 217, says: 'The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be, to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned. With this end in view not only must freedom of discussion be permitted, but there must be exemption afterward from liability for any publication made in good faith, and in the belief of its truth, the making of which, if true, would be justified by the occasion. There should consequently be freedom in discussing, in good faith, the character, the habits and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for a public office, either to the electors or to a board or officer having powers of appointment.'

"It may be asserted as a sound principle, and one supported by authority, that when a person consents to become a candidate for public office, conferred by a popular election, he should be considered as putting his character in issue so far as respects his qualification for the office. *Com. v. Clapp*, 4 Mass. 169; *Com. v. Odell*, 8 Pittsb. 449; *Rearick v. Wilcox*, 81 Ill. 177; *Odgers Libel*, etc., 236.

"Whatever pertains to the qualification of the candidate for the office sought is a legitimate subject for discussion and comment, provided that such discussion and comment is not extended beyond the prescribed limits. That is, all statements and comments in this respect must be confined to the truth, or what in good faith and upon probable cause is believed to be true; and the matter must be pertinent to the issue, i. e., it must relate to the suitability or unsuitability of the candidate for the office.

"In our form of government the supreme power is in the people; they create offices and select the officers. Then in the exercise of this high and important power of selecting their agents to administer for them the affairs of government, are the people to be denied the right of discussion and comment respecting the qualification or want of qualification of those, who by consenting to become candidates, challenge the support of the people on the ground of their peculiar fitness for the office sought? Usually it is by such discussion and comment concerning the qualification of opposing candidates that the people

Jones v. Townsend's Administratrix.

obtain the requisite information to enable them intelligently to exercise the elective franchise. Any abridgment of this right of discussion and comment, beyond the limitations heretofore stated, it seems to us would be extremely unwise.

"And in this respect the press occupies the same position and should be included in the same category with the people. Public journals are supported by, and are published with a view to the dissemination of useful knowledge among the people, and the comments and discussions of these journals are entitled to the same privileges and subject to the same limitations respecting the qualification and suitableness of candidates for office as those of the people.

"Chief Justice WILLIE, in *Belo v. Wren*, 5 Tex. Law Rev. 153, truly remarked that 'every facility should be allowed for the quick dissemination of useful facts, and the freedom of the press should not be restrained further than is absolutely necessary to protect private character from falsehood and slander.'

"It is implied by the rule announced by us that the matter published must be such as is justified by the occasion, that is, it must be such as would be appropriate for the electors to consider, in making a selection for the office. Ordinarily that would be a question of fact to be submitted to the jury by appropriate instructions.

"Then if the matter published is true, and such as is justified by the occasion, there could be no recovery by the candidate against the publisher. If the matter is not justified by the occasion, then the fact that the person against whom it was directed was at the time a candidate for office would not exempt the publisher from liability, whether the matter published was true or false. And although the matter published might be justified by the occasion, still if it was false, a right of action would accrue against the publisher, to defeat which the burden would be upon him to show that the publication was made in good faith, in the honest belief of its truth, and besides that there were just and reasonable grounds for entertaining that belief.

"While the rule here announced seems to be just to all, we are aware of the fact that it is not in accord with some, and perhaps a majority of the adjudicated cases in this country. In New York comments and discussions relating to public officers and candidates for official positions are placed upon the same footing as comments and discussions concerning the private character of other persons.

"The tendency in the English courts is more liberal in protecting the freedom of the press, and the holding there is in accord with the conclusions announced in this opinion, and which we believe to be well founded in reason and more nearly in accord with the spirit of constitutional liberty, and free republican institutions."

In *Davis v. Shepstone*, Priv. Co., 55 L. T. Rep. (N. S.) 1, it was held that statements made to a reporter in the employment of the proprietor of a newspaper, for the purposes of the newspaper, are not privileged. The lord chancellor said: "The respondent was in December, 1883, appointed resident commissioner to Zululand, and proceeded to the discharge of his duties to the Zulu reserve territory. In the month of March, 1883, the appellants published

Jones v. Townsend's Administratrix.

in an issue of their newspaper serious allegations with reference to the conduct of the respondent while in the execution of his office in the reserve territory. They stated that he had not only himself violently assaulted a Zulu chief, but had set on his native policemen to assault others. Upon the assumption that these statements were true they commented upon his conduct in terms of great severity, observing: 'We have always regarded Mr. Shepstone as a most unfit man to send to Zululand, if for no other reason than this, that the Zulus entertain toward him neither respect nor confidence. To these disqualifications he has now, if our information is correct, added another which is far more damnatory. Such an act as he has now been guilty of cannot be passed over if any kind of friendly relations are to be maintained between the colony and Zululand. There are difficulties enough in that direction without need for them to be increased by the headstrong, and almost insane imprudence and want of self-respect of the official who unworthily represents the government of the queen.' In the same issue under the heading 'Zululand,' there appeared a statement that four messengers had come from Natal to Zululand, from whom details had been obtained of the respondent's treatment of certain chiefs of the reserve territory who had visited Cetewayo, and what purported to be the account derived from these messengers of the assault and abusive language of which the respondent had been guilty, was given in detail. On the 16th of May, 1883, the appellants published a further article relating to the respondent, which commenced as follows: "Some time ago we stated in these columns that Mr. John Shepstone whilst in Zululand had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man.' The article then gave at length the statement so taken down, which disclosed, if true, the grossest misconduct on the part of the respondent. It was in respect of these publications of the appellants that the action was brought by the respondent

* * * There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libellous, charged the respondent as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting, that though some doubt had been thrown upon

Jones v. Townsend's Administratrix.

the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege. It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has indeed been held that fair and accurate reports of proceedings in parliament and in courts of justice are privileged, even though they contain defamatory matter affecting the character of individuals. But in the case of *Purcell v. Souler*, 2 C. P. Div. 215; 86 L. T. Rep. (N. S.) 416, the Court of Appeal expressly refused to extend the privilege even to a report of a meeting of poor law guardians, at which accusations of misconduct were made against their medical officer. And in their lordships' opinion it is clear that it cannot be extended to a report of statements made to the bishop of Natal, and by him transmitted to the appellants, or to statements made to the reporter in the employ of the appellants, who for the purposes of the newspaper sought an interview with messengers on their way to lay a complaint before the governor."

In *Wheaton v. Beecher*, Sup. Ct. of Mich., June 16, 1887, B., a citizen of Detroit, when interviewed by a reporter as to the candidacy of W. for the office of city comptroller, said he wondered if the people of Detroit would have the same experience with W. that England had with Cyprus; meaning that W. would turn out a sort of moral grave-yard. The interview was published in a newspaper. *Held*, in an action for libel by W. against B., that the publication was not privileged. The court said: "It is true the plaintiff was a candidate for appointment to the office of comptroller of the city of Detroit, but this did not license the defendant, or any other person, to vilify, falsify and calumniate the character of the plaintiff for honesty, integrity and morality. There is no doubt that when a man in this country becomes a candidate for an office, elective or appointive, his character for honesty and integrity, and his qualifications and fitness for the position, are put before the people, and are thereby made proper subjects for comment, and that publications of the truth in regard to the candidate are not libelous; and it is equally true that the publication of falsehood against such candidate is wrong, and deserves to be punished. I think Chief Justice PARSONS in *Com. v. Clap*, 4 Mass. 163, announces the correct doctrine upon this subject, wherein he says, speaking for the court: 'When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel: for it would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against their laws. For the same reason the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens to their great injury, and it may be to the loss of their liberties.' The same

Robinson v. Randolph.

doctrine is held in New York, Pennsylvania, Ohio, Tennessee, West Virginia and other States. *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 618; *Seely v. Blair*, Wright, 358, 688; *Brewer v. Weakley*, 2 Overt. 99; *Barr v. Moore*, 87 Penn. St. 385; s. c., 30 Am. Rep. 367; *Sweeney v. Baker*, 13 W. Va. 158; s. c., 31 Am. Rep. 757. In *Hamilton v. Eno*, 81 N. Y. 116, the court say: 'One may, in good faith, publish the truth concerning a public officer, but if he states that which is false and aspersive he is liable therefor, however good his motives.' And to the same effect, so far as it goes, is *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 257. And the same is true whether the party libelled be an officer or a candidate for an office, elective or appointive."

ROBINSON V. RANDOLPH.

(21 Fla. 629.)

Will—devise—restraint on alienation.

A testator devised lands in fee to a trustee in trust for his daughter, with a provision that neither she nor her husband should ever dispose of them. Held, that the restraint was ineffectual at any time while she was single, but became operative upon and during any marriage contracted by her before disposing of them.

BILL for construction of will. The head-note states the point.

Jas. D. Beggs, for appellant.

RANEY, J. [Omitting other points.] Having concluded that the quantity of interest or estate derived is a fee, the next question arises upon the effect of the provision that the property shall be so secured to the daughter that neither she nor husband shall ever dispose of it, including that appointing Mr. Daniel trustee to support the devise.

Counsel for appellant contends that the restraint upon alienation is void. He cites 1 Redf. Wills, 448; 2 Jarm. Wills, 528, 529; 21 Pick. 427. There is nothing in these citations inconsistent with the views we shall now submit.

It is settled that if a grant or devise to a male person of an absolute estate, legal or equitable in fee for life, be made, and there is annexed to it a condition that the grantee or devisee shall not have power to alien it at all, the condition is void, and the estate, in fee

or for life as it may be, will rest absolutely in the grantee or devisee. The power of alienation being necessarily and inseparably incidental to such an estate, it is held that to deny it is an attempt to create a new estate, not known to the law. There are however modifications of this rule which allow a restraint upon alienation for a limited stated period (2 Jarm. Wills, 533; 1 Washb. Real Prop. 80), and provide for the cessation of a life estate with limitation over in fee to another person, upon the tenant aliening his interest. We are not however dealing with a devise to or provision for a man. The provision is for a daughter, and the object and intent of the testator was to provide for her. Either a proximate and probable, or a remote and possible marriage of this daughter was in his mind. In the light of both English and American authorities we do not think it can be longer doubted that restraints upon both alienation and anticipation, or either, to be effectual during coverture, may be annexed to the separate equitable estate of a married woman. It makes no difference that the grant or devise so restrained was made or took effect while the daughter was single. If before disposing of the estate she marry, the limitation or restraint becomes effectual upon, and it continues so throughout the duration of such marriage; should she become discoverd, and marry again without having in the *interim* parted with her property, the restraint again becomes effectual for such subsequent marriage. It is true that during the period she is single the restraint is not binding, and in such unmarried state she may act as if it was not expressed or clearly implied in the deed or will under which she takes. At one time this restraining power was denied by the English courts. *Newton v. Reid*, 4 Sim. 141; *Massey v. Parker*, 2 M. & K. 174. But in the later cases it has become settled, and *Newton v. Reid* and *Massey v. Parker*, so far as they question it, are not allowed. It was found that the power of disposition given to a married woman over her separate equitable estate was, in view of the well-known influence of the husband, destructive of the very security intended for it. The court of equity having created such estate, it was held that it could modify its creature by annexing to it the restraining feature. *Tullett v. Armstrong*, 1 Beav. 1; s. c., 4 Myl. & Cr. 377; *Scarborough v. Boardman*, 1 Beav. 34; s. c., 4 M. & C. 377; *Clark v. Jaques*, 1 Beav. 36; *Baggett v. Meux*, 1 Coll. 138; s. c., 1 Phillips, 627; *Goulden v. Camm*, 1 DeG., F. & J. 146; *Peillion v. Brooking*, 25 Beav. 218.

The same doctrine is recognized in States of the Union. *Fears v. Brooks*, 12 Ga. 195; *Robert v. West*, 15 Ga. 122; *Freeman v. Flood*, 16 Ga. 528; *Weeks v. Sego*, 9 Ga. 199; *Nix v. Bradley*, 6 Rich. Eq. 43; *Beaufort v. Colyer*, 6 Humph. 486; *Perkins v. Hays*, 3 Gray, 405; *Nixon v. Rose*, 12 Gratt. 425; 2 Perry Trusts, §§ 670, 671.

In *Fears v. Brooks*, NISBET, J., speaking for the court, said: "A separate estate may be made in a *feme sole* as well as in a married woman, which upon marriage will be good against the marital right, and this although no particular marriage be in contemplation. Upon marriage the trust will immediately attach upon the property so as to exclude the husband's title, although no further settlement be executed."

It is true that in Pennsylvania no such restraint can be sustained unless there is a marriage in immediate view when the trust is created, and that on the termination of the coverture the trust falls, and is not revived by a second marriage. That a marriage is in view need not however even in that State appear by the instrument creating the trust, but the creation of the trust is evidence that the marriage was in contemplation of the donor, and when it is followed within a reasonable time by its consummation, it concludes the proof. *Wells v. McCall*, 64 Penn. St. 207.

It does not appear from the record of the case before us when the daughter, Mrs. Robinson, married, but it is stated that she was a *feme sole* at the testator's death. It may be that even under the rule in Pennsylvania there is no power of alienation in Mrs. Robinson during the present coverture. We have found no authority outside of Pennsylvania so limiting the rule, and see no reason why if the power can exist so limited, it cannot without such limitation.

As the rule allowing such restraint upon alienation is confined to separate equitable estates, the importance of the question, if not the interests involved, requires that we should consider whether the estate devised is of such character. It is a principle that the naming or appointment of a trustee by the donor is not essential to such an estate, but that equity will supply one whenever the intent of the donor to create a separate estate clearly appears. *Harwood v. Root*, 20 Fla. 955; *Fears v. Brooks*, 12 Ga. 195. There is no trouble here on this point, as a trustee is named by the testator. Does this trustee take the legal title to this property? Courts

imply a legal estate in trustees, although no estate be given them in words, as where they are required to do something that requires a legal estate of some kind in them. Perry Trusts, § 313.

If an agency or duty or power be imposed on the trustee, or if the purpose of the trust is to protect the estate, or if in other words it is a special or active trust, the legal title is in the trustee and the beneficiary has only an equitable estate. Perry Trusts, § 305; and wherever the words show a clear intent to create an estate for the sole and separate use of one during her married life, the same result will follow. Perry Trusts, § 309. We think it clear that this will impose upon the trustee the duty of protecting the *corpus* of this estate against alienation during the coverture; that upon the daughter's marriage this trust, to say nothing more, arose.

The chancellor, in *Nix v. Bradley, supra*, said: "There are three modes of disposition by which a separate estate may be created in favor of a married woman:

"*First*. When technical words are employed, as instances where the estate is given for the sole and separate use of the wife.

"*Second*. Where the estate is not given after this form, but the marital rights are excluded by express words, for example, where an estate is given to the wife, but not to be subject to the power, control or liabilities of the husband; or where the marital rights are restricted by words of a similar import.

"*Third*. When the marital rights are excluded by implication, as in instances where by the instrument creating the estate the wife has power to do acts, to exercise control, and to make dispositions of the property which are inconsistent with the marital rights. It is thought that the most, if not all the cases of this description may be brought within one or the other of these classifications."

In *Fears v. Brooks, supra*, the questions were: 1st. Did the will create a separate estate in the daughter? 2d. If so, does it restrain her right of alienation? Both questions were answered in the affirmative. It was held to be a separate estate because the marital rights were defeated, and further that this was the purpose of the testator, and that such purpose being legal it must be carried out, and that the marital right must yield. In *Mixon v. Roe*, 12 Gratt. 425, the devise was to trustees for the use and benefit of a daughter and her heirs, with the following provisions: "*And as it is my wish and desire to guard in the most ample manner against the impru-*

dent sale or other disposition of the aforesaid property during the natural life of said Emily Coupland (the daughter), it is hereby wholly and solely confided to the discretion of the aforesaid trustees in what manner the said Emily shall receive and enjoy the profits arising from the hire or other disposition of the slaves aforesaid, and in the event of the death of said Emily, without any heir or heirs of her body, then and in that case I desire that all the slaves and their increase shall be given up to my son, Gustavus, or his heirs forever.” “Here,” says the court, referring to the words italicised, “an intention is plainly indicated that neither the wife nor the husband shall have the right to sell or otherwise dispose of the property; which is inconsistent with the idea of its being given subject to its marital rights; in which case the *jus disponendi* would have been a necessary incident.” Again quoting 1 Bevan, 18, it is said: “The separate estate may, and often does exist without the restriction, but the restriction has no independent existence; when found it is a modification of the separate estate and inseparable from it.”

Under the Constitution and laws of Florida, where property is devised to a single woman directly, so as to give her the legal and equitable title, and she afterward marries, it during such married state is her separate, statutory property, and her title to the same continues separate, independent and beyond the control of her husband, and cannot be taken in execution for his debts, but it will remain in his care and management, and she is not entitled to sue her husband for the rent, hire, issues, proceeds or profits thereof, nor shall he charge for the management and care of the property, but he and she may by joint conveyance sell and convey the same in the manner prescribed by the statute.

Can any thing be clearer than the intention of testator to restrain the power of his daughter during her coverture to alienate or sell the land either by her separate act or the joint act of herself and her husband, is shown to be here? No more express or effectual language could have been used.

The prayer of the bill cannot therefore be granted, and the decree must be reversed and the bill dismissed, without prejudice as to any other question.

Decree reversed.

Savannah, Florida and Western Railway Company v. Geiger.

SAVANNAH, FLORIDA AND WESTERN RAILWAY COMPANY v.
GEIGER.

(21 Fla. 609.)

Negligence — presumption — killing cattle.

In an action against a railroad company for killing cattle, negligence on the part of the defendant is not presumed from proof of the killing. (*See note, p. 708.*)

ACTION for killing cattle. The opinion states the point. The plaintiff had judgment below.

Fleming & Daniel, and Robb W. Davis, for appellant.

T. B. Bedford, for appellee.

RANEY, J. [Omitting other points.] Unless the statutes have changed the rule, or there is something in the very nature of such a killing or injury by a railroad train making the rule inapplicable, the declaration must allege and the proofs must show that the injury was occasioned by the company's negligence, and the burden of proof is on the plaintiff. *Alger v. R. Co.*, 10 Iowa, 268; *Jacksonville Street R. Co. v. Campbell*, 21 Fla. 175.

If under all the circumstances of a particular case, as shown by the testimony, it appears that the killing or injury could not have been avoided by the exercise of reasonable care on the part of the agents of the company operating the train, there can be no recovery. If on the other hand, it is shown that had such agents exercised reasonable care under the circumstances surrounding them they could have avoided running against the stock and injuring it, but that they did not do so, the company is guilty of negligence and liable for the damage. *Railroad Co. v. Patton, supra*; *Kerichacker v. R. Co.*, 3 Ohio St. 172; *Alger v. M. & M. R. Co.*, 10 Iowa, 268. If there is contributory negligence upon the part of the owner of the stock he cannot recover, but permitting them to go at large does not of itself, though followed by their going on the track, constitute contributory negligence in him, or make them trespassers under our laws. 10 Iowa, 268; s. c., 43 Miss. 259.

It is true that there is in the nature or necessary circumstances of every killing or injury of stock by railroad engine or train some-

VOL. LVIII — 88

Savannah, Florida and Western Railway Company v. Geiger.

thing making it an exception from the general rule which requires of the plaintiff both an allegation and proof of negligence. In South Carolina, in *Danner's* case, 4 Rich. 329 (which is not before us, but is reviewed in *Jones v. C. & G. R. Co.*, 20 S. C. and 19 A. & E. R. Cases, 459), the rule laid down according to *Jones v. C. & G. R. Co.*, is that the killing of stock by a railroad train being proved, the law presumes the injury was done through the negligence of the railroad company until the contrary is shown. It is said in *Danner's* case, says the opinion in *Jones v. C. & G. R. Co.*: "That the company did not produce witnesses to show how the damage occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defense. They had the witnesses under their control," and after referring to the possible absence of the plaintiff, it proceeds: "When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed into an admission. The same construction may be put on a party's omission to offer testimony in his defense when it is in his power to produce witnesses who might exculpate him." The principle upon which the case of *Danner* is stated by the chief justice in *Jones' case* to have turned, is "the fact that it was in the power of the defendant alone to explain and he failed to attempt it." The cases said to be relied on by the court in *Danner's* case, are *Leame v. Bray*, 3 East, 593; *Weaver v. Ward*, Hopk. 134, which is not at our command; *Christie v. Griggs*, 2 Camp. 79; *Piggott v. E. C. R. Co.*, 54 Eng. C. L. 228; *Ellis v. P. & R. R. Co.*, 2 Ired. 104. Do they support it? *Leame v. Bray* was an action of trespass *vi et armis* against the defendant for driving his chaise against plaintiff's vehicle, drawn by two horses, on the highway, by means whereof plaintiff's driver was thrown out, and his horses ran away with the vehicle, and plaintiff for the preservation of his life jumped while the horses were running and fell upon the ground and fractured his collar bone. It happened on a dark night and was owing to the defendant driving his chaise on the wrong side of the road, and the parties were unable to see each other; but had defendant kept his right side of the road there would have been ample room for the carriages to pass each other. The sole question involved in the case as reported is, whether trespass or case was the proper action, and it was held that trespass was. There is nothing in the case as reported indicating that any thing said by any of the judges could

Savannah, Florida and Western Railway Company v. Geiger.

have been uttered with reference to a question of proof or evidence of negligence. In *Christie v. Griggs*, the plaintiff, a pilot, was travelling to London, on a stage which broke down and he was greatly bruised. Having proved that the axle-tree snapped asunder at a place where there was a slight descent, and that he was in consequence precipitated from the top of the coach, and that the bruises he received confined him several weeks to his bed, he rested his case. The opinion in this case, by MANSFIELD, C. J., at *nisi prius*, states that "the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were all probably sailors like himself, and how do they know whether the coach was well built or whether the coachman drove skillfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded, and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident." In *Piggott v. E. C. R. Co.*, the thatch of a shed near the road was observed immediately after the passing of a train to be on fire, and notwithstanding every exertion upon the plaintiff's part to extinguish the fire it communicated with several other buildings and destroyed them. The wind was blowing toward the premises from the road. Against defendant's objections witnesses were allowed to testify to the falling of sparks on other occasions at this point, for the purpose however of ascertaining whether sparks could be thrown for so great a distance from the railroad. Other witnesses, practically acquainted with the construction and working of engines generally in use on railroads, testified that the emission of sparks or ignited matter from the top of the chimney might, in a great measure, be prevented by a cap or covering of wire work or by perforated plates, for intercepting the escaping particles though it was admitted that this would to a certain extent impede the draft and consequently diminish the power of the engine. They however stated that this might be remedied on the emission of sparks altogether prevented by employing engines of such power

Savannah, Florida and Western Railway Company v. Geiger.

that they need not be worked to their utmost capacity, and that in their judgment, to produce the alleged injury, the engine used on the occasion in question must have been worked to its utmost, and that the danger arising from the emission of sparks might be entirely prevented by shutting off the steam on passing a spot where danger was to be apprehended. There was a verdict for the plaintiff. Upon motion for a new trial, Chief Justice TINDAL, after remarking that the law requires of railroad companies, operating, as they do, agents of an extremely dangerous and unruly character, that they adopt such precautions as may reasonably prevent damage to the property of third persons near which their railway passes, said that the evidence in this case was abundantly sufficient to show that the injury was caused by the emission of sparks or particles of ignited coke from one of the defendant's engines, and that there was no proof of any precaution adopted by the company to avoid such a mischance, and that the jury was right in finding that the company was guilty of negligence, and after citing as parallel to the want of the precaution as to the sparks suggested by witnesses the case of one allowing a dog, known to be accustomed to bite, to go about unmuzzled, remarked: "The precautions suggested by the witnesses called for the plaintiff in" this case, may be compared to the muzzle in *Smith v. Pelch*, 2 Strange, 1267. The other judges took substantially the same view, not using however the illustration as to the muzzled dog. The case of *Ellis v. P. & R. R. Co.*, was where the fence was proved to have been discovered to be on fire immediately after the engine passed, and some of it burned before the fire could be stopped. Plaintiff proved the engines upon the road usually had "spark catchers on the funnel," but whether they were on this particular engine at this time he did not recollect. It was held that though negligence was the gravamen of the plaintiff's case, yet when he shows damage resulting from defendant's act, which act with the exercise of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence which cannot be repelled but by proof of some extraordinary accident which renders care useless.

The breaking of the axle-tree in the *Christie* case was itself *prima facie* evidence of negligence on the part of the owner of the coach. It was his duty to have axle-trees sufficient for the purposes of his business. The breaking under the circumstances was evidence that he fell short of this duty, and that the coach was not then "well

Savannah, Florida and Western Railway Company v. Geiger.

built." There is nothing in the case intimating that it is ever unnecessary for the plaintiff, whatever his ignorance of the nature or character of the real cause of the mishap, to go so far as to prove some fact which is of itself *prima facie* evidence of neglect or failure upon defendant's part in doing his duty. The *Piggott* and *Ellis* cases are based upon the principle that the use of well-known appliances, which it is the duty of the operators of railroads to use, will, as a general rule, prevent such escape of sparks as will set fire to buildings and fences standing adjacent to the road. In all such cases the relation of the structures to the road is always established, and is always well understood or can be readily seen or learned by the agents operating the train approaching or passing them.

The nature of the South Carolina case and that before us does not properly assimilate to the four cases we have reviewed. No inherent defect is shown in any thing relating to the road or train as was shown in the coach in *Christie's* case. The fixed relation which buildings and fences bear to the track and to passing trains, and which has enabled science and skill to provide those appliances, which as a general rule prevent such escape of sparks as will set fire to and burn them has no counterpart in the uncertain and varying circumstances under which cattle may appear on a railroad track. To put the two classes of cases on a level we think it at least necessary to establish by evidence the locality on the road where the collision occurred. These varying circumstances render it impossible to establish a rule like that in the *Piggott* and *Ellis* cases, except upon the false basis of assuming a fixed state of circumstances for something that is wholly uncertain in its nature. The law permits a train to be run upon its track as rapidly as its business requires, and is consistent with the safety of the passengers and the property it transports, without moderating its speed on account of the probability of coming upon roaming cattle. It is in its nature a thing upon which in its legitimate use not only great force necessarily attends, but is of such a character that when moving at a legitimate or ordinary rate of speed it cannot be stopped at once or always in time to avoid collision with something that may have unexpectedly come upon its track. The place or the circumstances of the coming of cattle cannot be anticipated, like the circumstances which may surround when a train passes a fence or a building. The law which permits the operation of a train charges the owner of any animal coming on its track with notice of its nature. If it be dan-

gerous it is still lawful. In running at an ordinary speed it is doing nothing forbidden, but the very thing contemplated by its organization and required by the commerce of the country. It has just as much right to run as cattle have to range. Grant that cattle which go upon its track are not trespassers, nor their owners liable for damages resulting therefrom to the railroad companies (which is well settled by preceding authorities), yet when they do go upon it and collision takes place and death or any thing ensues to them, and nothing else appears, how can it be said that there is evidence of any omission of duty upon the part of the railroad company or its agents, the law being as it is, that it is not required to lessen the otherwise proper speed of its trains on their account? No one is presumed by the law to do wrong or not to do his duty. Proof of results which indicate only an ordinary and proper act, and no extraordinary or improper conduct in an individual, is no evidence of negligence on his part. Proof of death to a hog, sheep or cow by being struck by a railroad train is proof of a result which indicates nothing more than an ordinary operation of the train; to say there was negligence we have to assume from what is altogether uncertain that the circumstances were of a certain character and such that the injury, or what is tantamount, the collision might have been avoided by the exercise of due care upon the part of the company's agents. Grant, as we must, that proof of the locality of the collision will generally show whether or not, by proper attention, the animal on the track could have been seen in time for the train to be stopped by the prompt use of brakes and the collision avoided, yet when we know that cattle may and sometimes do come upon the track at places, and under circumstances where this would be impossible, and it may be, even when for the protection of the lives of passengers, an increase of speed is necessary (*Owens v. R. Co.*, 58 Mo. 388, 389), still we cannot assume as a general rule not only the circumstances, but that they were such as that the killing would not have occurred if proper care had been shown, and as imply a want of care on the company's part.

The reasoning in *Danner's* case is exceptional. Where the burden is put by the pleadings upon the plaintiff, there is no rule of law that the defendant's failure to produce witnesses upon trial, or his silence there as to what he may know, can be taken to make a *prima facie* case for the plaintiff. Where the plaintiff's evidence is insufficient the defendant may demur to it successfully. The fact

Savannah, Florida and Western Railway Company v. Geiger.

that witnesses to an occurrence are in the employ of a railroad company imposes upon it no more duty to produce them or their evidence at the trial than their being employed by an individual would impose on him. The rules of evidence permitting proof by admissions—silence, where an act has been specifically charged in conversation against a defendant—has never been extended to a defendant preserving silence in court until a *prima facie* case has been made by plaintiff's evidence on the trial. Under our rules of evidence by which, as a general rule, neither interest nor being a party to the record disqualifies from testifying, "the fact that it was in the power of the defendant alone to explain, and he failed to do it," is not tenable as a principle upon which to support the ruling in *Danner's* case, if it ever was. One party can make a witness of the other.

Independent of any legislation on the subject, we do not think that proof of the mere killing, independent of locality or some other circumstance which shows that it would not have resulted if reasonable care had been taken, or some omission of duty, as a failure to blow the whistle for the purpose of scaring the cattle off, is *prima facie* evidence of negligence upon the part of the company. *B. & M. Railroad v. Wilt*, 12 Neb. 76; *Schiner v. Railroad Co.*, 40 Iowa, 337; *Balije v. Railroad Co.*, 26 Tex. 604; *Walsh v. Railroad Co.*, 8 Nev. 110; *Railroad Co. v. Means*, 14 Ind. 30; *McKissock v. Railroad Co.*, 73 Mo. 59; *Railroad Co. v. McMillan*, 7 (Ohio) Am. & Eng. R. Cases, 5 8. See also 19 Am. & Eng. R. Cases, 458, note.

We think the demurrer to the declaration should have been sustained, and that the court erred in charging the jury as to the killing being made *prima facie* evidence, and in refusing the instructions numbered 2 and 7 requested by the defendant, but that it did not err in refusing the instruction numbered 2, as it uses the word willful, or in refusing that numbered 4, nor that numbered 6, as it is too broad.

The judgment is reversed and the case will be remanded with directions to sustain the demurrer to the declaration, with leave to the plaintiff to amend the declaration and for further proceedings in accordance with this opinion.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—See note, 50 Am. Rep. 553. Thompson says (Negligence, 512, § 15): "In a number of cases it has been held that the simple fact of injury to the animals by train of the defendant, unaccompanied

Savannah, Florida and Western Railway Company v. Geiger.

by any thing which tends to show positive negligence or misconduct of the company's agents, is insufficient to charge the company. This is the rule in those States where the company is not bound to fence its track, and where stock is permitted to run at large upon uninclosed lands without thereby rendering the owner liable as a trespasser. In many cases however a different rule has been announced." Citing *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 572; *Chic., etc., R. Co. v. Patchin*, 16 Ill. 198; *Bethje v. Houston, etc., R. Co.*, 23 Tex. 694; *Schiner v. Chic., etc., R. Co.*, 40 Iowa, 337; *Indianapolis, etc., R. Co. v. Means*, 14 Ind. 30; *Walah v. Virginia, etc., R. Co.*, 8 Nev. 111; *Grand Rapids, etc., R. Co. v. Judson*, 35 Mich. 597; *Brown v. Hannibal, etc., R. Co.*, 33 Mo. 309; *Terry v. N. Y., etc., R. Co.*, 23 Barb. 575; *Lindsay v. Conn. R. Co.*, 27 Vt. 543; *Scott v. Wilmington, etc., R. Co.*, 4 Jones L. 432. "If the cattle are rightfully upon the railroad track at the time of the injury, it has been held that proof of such fact, with the injury, makes a *prima facie* case of negligence," etc. Citing *White v. Concord R. Co.*, 30 N. H. 207; *Danner v. So. Car. R. Co.*, 4 Rich. L. 330; *Galpin v. Chic., etc., R. Co.*, 19 Wis. 604; *McCoy v. California, etc., R. Co.*, 40 Cal. 532.

Wood says (Railway Law, 1565): "Except in those cases where the statute makes the mere fact of killing *prima facie* evidence of negligence on the part of the company, the burden of establishing such negligence is upon the plaintiff." "But in some of the States the mere fact of the injury is held to operate as *prima facie* evidence of negligence." *Woolfolk v. Macon, etc. R. Co.*, 56 Ga. 457. "Liability does not attach from the mere fact of killing." *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 572.

Redfield says (Railw. 466): "The fact of killing an animal of value by the company's engines is no *prima facie* evidence of negligence on their part." "But if the railway are bound to maintain fences, as against the owner of the cattle, and they come upon the road through defect of such fences, and are injured, the company are in general liable without further proof of negligence." P. 467. "The mere killing of an animal by a railway company does not render them liable, unless they have been guilty of negligence, or the case comes within the statute." P. 480.

Pierce says (Railroads, 428): "The injury itself, though inflicted by the company, is not *prima facie* evidence of negligence," "where the company is not required to maintain a fence." *Waldron v. Portland, etc., R. Co.*, 35 Me. 422; *Locke v. St. Paul, etc., R. Co.*, 15 Minn. 350. *Contra*: the *Danner* and *Woolfolk* cases, and *Smith v. Eastern R. Co.*, 35 N. H. 356.

If the track is not fenced where it should be, the law presumes negligence. *International, etc., R. Co. v. Cocks*, 64 Tex. 151; *Robinson v. St. Louis, etc., R. Co.*, 21 Mo. App. 141; *Denver, etc., Ry. Co. v. Uhandler*, 8 Colo. 371; *East Tenn., etc., R. Co. v. Bayless*, 74 Ala. 150; *Little Rock, etc., Ry. Co. v. Jones*, 41 Ark. 157; *Union Pac. Ry. Co. v. High*, 14 Neb. 14.

But the burden is on the plaintiff to show that the injury was done at a point where the company is required to fence. *Kyser v. Kansas, etc., R. Co.*, 56 Iowa, 207.

In *Ohio, etc., R. Co. v. Miles*, 76 Va. 773, it was held that there could be no recovery without proof of negligence.

Savannah, Florida and Western Railway Company v. Geiger.

In *Jones v. Columbia, etc., R. Co.*, 20 S. C. 249, it was held that the killing of stock by a railway train being proved, negligence is presumed *prima facie*, although recent statutes require the owners of stock to keep it inclosed. The court said:

"There can be no doubt but that the recent acts of the legislature, known as the stock law, have materially and fundamentally changed the previous law as to the roaming at large of cattle. Prior to the passage of these acts, the law, in its effect, required crops to be fenced in and it permitted cattle to roam at will. It was then no trespass for the stock of one man to graze upon the uninclosed lands of another. Now however this is changed, and stock is required to be fenced in and crops need not be inclosed. There can be no doubt either that the effect of this legislation has been to make the roaming of cattle upon the uninclosed lands of others than the owner of such cattle a trespass, for which such owners may in some form or other be held responsible. These principles are conceded.

"Was *Danner's* case based on the law first announced above to such extent that the doctrine announced and applied there would not have been announced and applied but for the fact that that law was then of force? Would the presumption of negligence arising from the naked fact of killing as established in that case have been established by the court, had the present stock law been of force making it a trespass for the cattle of others to roam upon other lands than that of their owners, instead of permitting, and to some extent legalizing, such roaming? If the foundation of *Danner's* case was the law as it then stood as to crops and cattle, requiring the one to be fenced in and the other to be fenced out, then there would be much merit in the appeal and the case would be relieved from many of the difficulties now surrounding it. It would not involve the overruling of *Danner's* case or touch the wise doctrine of *stare decisis*, as in that view the underlying principles of law controlling the facts in *Danner's* case being changed by subsequent legislation, as it is contended, the question would be presented in an entirely new attitude.

"If however *Danner's* case rested upon other principles than this, principles which have not been impaired by the subsequent stock law legislation — principles which our Supreme Court at that time found well established and settled — then that case would stand directly across the path of the appellant, and the plaintiff might successfully invoke the doctrine of *stare decisis*. *Danner's* case was not only solemnly decided after careful examination by the court of last resort, but it has been subsequently approved and affirmed. And that it has been the law of this State since its decision has never been doubted. And although it may seem to be a new principle and not in full harmony with many railway decisions in America, yet it would be a precedent which under the circumstances this court would feel constrained to follow, unless upon examination it is ascertained to have been founded upon a state of facts requiring the application of a different principle of law from that which the facts now require. In fact we would have no other alternative unless we disregarded the settled practice and rules of this court.

"There seems to be some misapprehension as to the real point decided in *Danner's* case, as well as to the principles upon which it rested. The court

Savannah, Florida and Western Railway Company v. Geiger.

did not decide that railroad companies were responsible in all cases where stock were killed on their track, whether the killing was willful, negligent or accidental; nor did it discriminate between slight, ordinary or gross negligence. These questions were untouched and left under the operation of the common-law rules already established. But what the court did decide was rather in the nature of a rule of evidence than otherwise, determining the *quantum* of testimony which might carry a case of this kind to the jury, and it seems to have been founded upon what the court regarded as a necessity in such cases. The court simply held that the plaintiff, upon proof of the killing, might rest; that this would make out a *prima facie* case of all that was necessary to hold the defendant responsible, and if it remained unexplained, liability attached.

"The court did not hold that the proof of negligence was unnecessary, or that it was not incumbent upon the plaintiff to offer such proof, but it held that while this fact was a necessary ingredient in the liability of defendant, yet the proof of the killing, unexplained by the circumstances or by the testimony of the defendant, furnished in itself sufficient evidence of the presence of such negligence as would hold the defendant responsible. The court said: 'That the company did not produce witnesses to show how the damage occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defense. They had the witnesses under their control. The plaintiff may not have been present when his cattle were killed and may not be able to discover who were the persons employed on the train when the damage was done. When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed into an admission. The same construction may be put on a party's omission to offer testimony in his defense when it is in his power to produce witnesses who might exculpate him.' This was the principle upon which the case turned, to-wit, the fact that it was in the power of the defendant alone to explain, and that he failed to attempt it. There is not a word or an intimation appearing in the case which involved the stock law as it then existed, as one of the elements of the decision.

"Nor can we say that the opinion of the court was unsustained by authority. The cases relied on and cited seem to support it. *Leame v. Bray*, 3 East, 593; *Weaver v. Ward*, Hopk. 134; *Christie v. Griggs*, 2 Cam. 78; *Piggott v. Eastern Counties R. Co.*, 54 Eng. Com. L. 228; *Ellis v. Portsmouth & Roanoke R.*, 2 Ired. 140. But whether this be so or not *Danner's* case was heard in 1811, over thirty years ago. Since then it has been regarded as the settled law of this State. It had the sanction of an unanimous court, Judge FROST delivering the opinion of the court, and O'NEALL, EVANS, WARDLAW and WHITNER concurring, than whom neither our judicial gallery nor that of any State has ever furnished a more imposing array. It has grown gray with time, and the country, citizens, railroads and all have understood it and conformed to it. Under those circumstances its roots have gone down too deep to be torn up easily.

"In addition to the authorities referred to, *supra*, in *Cooley on Torts*, the following is found, which fully accords with *Danner's* case. Mr. Cooley says: 'The duty being pointed out, the failure to observe it is to be shown; in

Savannah, Florida and Western Railway Company v. Geiger.

other words, the existence of negligence. This is an affirmative fact, the presumption always being, until the contrary appears, that every man will perform his duty. But the *quantum* of evidence necessary to make out a *prima facie* case of negligence is very slight in some cases, while in others a more strict showing is required. A bailee who returns in an injured condition an article which has been loaned to him is by this very condition called upon to explain, for a presumption of fault must arise therefrom against him. If a child is sent into the streets of a city in charge of a spirited team, which apparently he is too young and weak to manage, the negligence seems manifest, while there might be no appearance of want of due care had the team been broken down by labor and years. Often the injury itself affords sufficient *prima facie* evidence of negligence. Thus if the buildings of individuals are destroyed by fire originating in sparks from a locomotive, the fire itself is held to be evidence of negligence which requires to be overcome by some showing that the railway company provides suitable precautions against such an occurrence, etc. There is consequently nothing unreasonable in presuming negligence from the occurrence of an injury and calling upon the railway authorities to rebut the *prima facie* case by showing that they took reasonable care, etc. Cooley Torts, 665."

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BROWN v. SUSQUEHANNA BOOM CO.

(109 Penn. St. 57.)

Corporation — negligence — boom company — consolidation.

Two boom companies having booms on the same river were consolidated. Both were required by their separate charters to maintain booms sufficiently strong to retain all the lumber contained in them, and by the act of consolidation the company was entitled to all the rights and privileges and subject to all the restrictions of the former charters. *Held*, (1) that the company was liable for loss by insufficiency of the boom, but not for unavoidable dangers or inevitable accidents; (2) that on proof of loss such insufficiency would be presumed; (3) that the company was not bound to maintain the lower boom sufficient to detain all the lumber carried away from the upper boom by the act of God, for only for such logs as were intended for it.

ACTION for loss of lumber. The opinion states the case. The defendant had judgment below.

Wm. H. Armstrong, R. L. Allen, and Samuel Lain, for plaintiff in error.

B. S. Bentley, H. C. Parsons, and H. C. McCormick, for defendants in error.

CLARK, J. The Susquehanna Boom Company is a corporation, originally created and existing by virtue of an act of assembly, ap-

Brown v. Susquehanna Boom Co.

proved 26th March, 1846. Its franchise originally extended up the Susquehanna river from the western boundary of the city of Williamsport, a distance of seven miles; but its limits were afterward extended by act of assembly, approved 28th April, 1864, fifteen miles further up the stream. The Loyalsock Boom Company was created by act of assembly, approved 11th April, 1848, and its franchise extended from the western boundary of the city, down the river, a distance of sixteen miles, to the Muncy dam. By the act of 21st April, 1858, the companies were consolidated under the name of the Susquehanna Boom Co., "with all the rights, privileges and immunities, and subject to all the restrictions," contained in their respective charters. The powers conferred and duties imposed upon the respective companies, as set forth in their respective charters, were, "to erect and maintain on the west branch of the river Susquehanna, between the borough of Williamsport and the mouth of Quineshoque creek, such boom or booms with piers, as may be necessary for the purpose of stopping and securing logs, masts, spars and other lumber, floating upon said river, and erect such piers, side, branch or sheer booms, as may be necessary for that purpose." "And the said corporation shall construct, and at all times keep and maintain their piers and booms sufficiently strong to secure all the lumber contained therein; but no person shall be allowed at any time to encumber said booms with rafts, either of logs or other lumber."

The plaintiffs were the owners of an extensive saw-mill property in the city of Williamsport. In the year 1867, and also in 1868, large quantities of their logs, which they had driven down the river into the Susquehanna boom, to stock their mills, escaped, and were wholly lost, and this action was brought to recover damages for the injuries thus sustained.

On the 29th September, 1880, the parties, by agreement in writing, waived a trial by jury and submitted the decision of the case to the court, under the act of 22d April, 1874; the questions now presented for our consideration arise upon exceptions filed to the decision of the court, under the provision of that act.

There was some dispute as to the precise manner in which these several losses occurred, but the facts are found and particularly stated by the court as follows: "If the logs come into the boom on such low water that they will not pack, but remain on the surface of the water, the boom will not hold one-half as many logs,

Brown v. Susquehanna Boom Co.

and will soon fill up to its head. If then there should be a slight rise in the river, or if for any other cause this vast body of logs should surge down, as they will do, some logs may be forced on top of the boom platforms and cause them to sink under the water, thus making an outlet whereby the great pressure is relieved. The boom platform being thus sunken, the logs are forced out of the boom at this point, soon a channel is thus made, and a large quantity of logs will surely escape. This is called a 'spew' of logs. It is impossible to prevent this accident. No man can tell when or where it will occur, and the strength or weakness of the boom structure has nothing to do with its occurrence. No part of the boom structure is broken by this accident. This is the kind of accident which occurred when the plaintiffs' logs were lost in 1867, for which they bring their action."

"If the logs come into the boom on such low water that they will not pack, but remain on the surface of the water, the boom will not hold one-half as many logs and will soon fill up to its head. If then no rise in the water or other thing occurs to cause the logs to surge down in the boom, it is certain and inevitable that all logs coming down after the boom is full must go by the boom and be lost. This is called an 'overflow' of logs. This was the situation immediately before the accident happened when the plaintiffs' logs were lost in 1868."

The plaintiffs contend in the first place, that the Susquehanna Boom Co. is liable to them for the value of the logs lost in 1867 and 1868, without any proof of negligence; that by the express terms of the charter the company was held "to construct its piers and booms sufficiently strong to secure all the lumber contained therein," and that as the powers and privileges conferred were in derogation of common right, were exclusive, and for personal profit, the liability for losses must be according to the strictest import of the statute. They therefore treat the words of the statute as imposing upon the company a responsibility which is absolute and unlimited — the responsibility of an insurer against all risks of whatsoever kind or character. It will be seen however that the responsibility of the company is not expressed in the statute; the liability for losses is but an implication of law from the failure to perform, after the acceptance of the charter, what the charter requires. In the ascertainment of the extent of that liability therefore we are remitted to the consideration of what is really required. What therefore

under a fair construction of the charter, was the company bound to do?

It is doubtless true that such charters are to be construed most beneficially for the public, and more strictly against the company, but the construction must be a reasonable one. The charters of most private corporations are for purposes of private gain, and many of them grant exclusive privileges in abridgment of individual right, but as they are intended also to subserve great public interests they should be so construed as not to defeat the purpose of their creation. The Susquehanna Boom Company was not only intended to serve the private interest of the corporators, but also that of the public, and especially of those who with rafts, logs, or lumber should navigate the stream; it proposed to do for them what they could in no way do for themselves. Whilst therefore the words of the charter should be construed with some degree of strictness for the public protection, it should not be construed to require the performance of what, in the nature of the case, cannot be performed. By the words of the charter the company was required to "construct its piers and booms sufficiently strong to secure all the lumber contained therein." If this is to be understood in any absolute sense, it required the performance of an admitted impossibility; it was impossible, of course, to construct a boom, which at all times and under all circumstances, would hold all the lumber contained therein. We are informed by the finding of the court, that if the logs come into the boom, on very high water, as in the flood of 1865, no boom structure will hold them, and if they come in on a low water, "spews" and "overflows" are inevitable accidents, which it is impossible at times to prevent. Did the legislature, in the passage of this act, intend to do an absurd and unreasonable thing? It was certainly not supposed that the corporators could overcome the power of nature, or build a boom which would stand sufficient and secure against all the casualties that might occur; the language of the charter must be taken in a sense restricted by reason and common experience. Such a construction of the statute does not, we think, involve any interpolation of words into it; it accords with the general understanding of the language actually employed. A vessel sufficiently strong to secure its cargo may in a moment be dashed to pieces in a storm; a house built upon the solid rock sufficient and secure, may be utterly demolished, even in a slight tremor of the earth, and a boom, in

all respects sufficiently strong to secure all the lumber contained therein, may be swept away by the inevitable power of the flood.

But the defendants are held to the exercise of more than ordinary diligence and care in the discharge of the obligations imposed. They may not perhaps be held to do what, in the very nature of the case, cannot be done, but they may certainly obligate themselves to do what can be done; this is the exact measure of duty which the company assumed by acceptance of the charter. They are therefore liable for all losses which may have occurred from any insufficiency of their boom, whether from negligence or not, unless that insufficiency arose from the unavoidable dangers of the river, or from inevitable accident. The case does not present a question of negligence, but a question of performance. The defendants are not merely bailees for hire, and bound under the rule of the common law to ordinary care only; they are bound to do what it was their self-imposed duty to do, unless by the act of God they were prevented. We agree with the plaintiffs therefore first, that the degree of care which the company was bound to exercise to secure the logs in their boom is fixed by the charter; and second, that in the event of a loss the company is liable under the charter without proof of negligence. This is the precise doctrine declared in *Penn. & Ohio Canal Co. v. Graham*, 63 Penn. St. 290; s. c., 3 Am. Rep. 549, where the authorities are fully collected and carefully considered by the late Justice SHARSWOOD. In that case, a canal company, by its charter, was required to build and keep in repair bridges at all points where the canal crossed a public road. A traveller was passing over one of these bridges when it gave way, and he was precipitated with his wagon into the canal; in an action for damages for the injuries sustained, it was held that the charter is a law imposing on the company the burden of performing a duty to the public, and if that duty be not performed the company is responsible to those who thereby suffer special injury; and further, that a corporation, bound in consideration of its franchise, to keep a road or bridge in repair, is liable for injury from want of repair, whether the defect be patent or latent, unless the party injured be himself in default, or the defect was from inevitable accident, tempest or lightning, or the wrongful act of a third person, of which the corporation had no notice; and this, although ordinary care was used in the erection or repair, and the work was done by competent workmen under contract. At this

Brown v. Susquehanna Boom Co.

point however we are confronted with the following clear, comprehensive and conclusive findings of the learned court below: .

“I find that the plaintiffs’ logs, for the loss of which they bring this suit, were lost directly by the ‘unavoidable dangers of the river’ or ‘inevitable accident’ incident to the booming of logs in the west branch of the Susquehanna river under the defendant’s charter.”

“I find that in respect to the plaintiffs’ logs, for the loss of which this suit is brought, the defendants were not guilty of any fault, negligence or want of care either before, at the time of, or after the accidents happened whereby the losses occurred.”

These findings, in our opinion, are fatal to the plaintiff’s recovery in this case. It is well settled by the decisions of this court, that in a case tried by the court, under the act of 1874, a writ of error only brings up questions of law. This court cannot go behind the findings of fact, as they appear in the record. The judge, in such cases, exercises the double function of court and jury, and we are to dispose of the case here, precisely as if the facts had been found by a jury; if there was evidence of the fact, the finding cannot be impeached. It is useless therefore to assign for error mere matters of fact, unless the assignment is such as could be heard and determined, if the trial had been according to the course of the common law. The parties, by agreement, designated the tribunal for the determination of these disputed questions of fact, and they cannot now complain if the adjudication is adverse to their interests. *Jamison v. Collins*, 83 Penn. St. 359; *Lee v. Keys*, 88 Penn. St. 175; *Brown v. Dempsey*, 95 Penn. St. 243; *Bradlee v. Whitney*, 108 Penn. St. 362.

If the losses resulted from the unavoidable dangers of the river, or from inevitable accident, incident to the business, and we are bound to assume that they did; if the defendants were not guilty of any fault, negligence or want of care, either before, at the time, or after the accident happened, whereby the losses occurred, and this we are also bound to assume, then it matters not whether the defendants be treated as bailees for hire, as common carriers, or as bound by the special provisions of their charter; in any case, they are relieved from responsibility for the injuries sustained.

It has been urged very strongly in the argument that it was the duty of the Susquehanna Boom Company, under their charter, to have their lower boom, the Loyalsock, hung, and in proper con-

dition, to stop and hold the logs, at the time of the losses in 1867 and 1868. In the 16th point submitted by the plaintiffs, the court was requested to find as follows:

“That if the lower boom had been properly and in due time hung with its sheer, and had been guarded and cared for with due diligence, before and at the time of the breaking of the upper boom in 1867, as hereinbefore stated, it would have been sufficient to catch and secure all the logs which escaped through the breach of the upper boom at that time, and have prevented the loss of which the plaintiffs complain.”

The 17th point was to the same effect, excepting that it related to the loss of 1868. The court found that neither of these points was sustained by the evidence. Now whatever may have been the defendants' duty, if the Loyalsock boom had been found to have been available and sufficient, to prevent the loss, it must be admitted, that in view of this finding, the question is one of little importance. For of what avail would it be to oblige the performance of that which could serve no useful purpose? If the hanging of the sheer and the guarding of the Loyalsock boom would not have secured the logs, upon what principle of law or of common sense would the defendants have been obliged to undertake that work? But assuming the sufficiency of the Loyalsock boom to save the loss, was it the duty of the company to hang the sheer and guard that boom to save logs consigned to, but escaping from the Susquehanna boom, by unavoidable and inevitable accident? The Loyalsock was not a mere appendage or appurtenance of the Susquehanna boom, nor was it designed or used to take logs escaping from that boom; it was erected and maintained as a separate and distinct boom, to take and secure logs consigned to it, as a supply to the mills below. Mills are so located, with reference to the boom, that the logs, when rafted out, may be floated with the current. The plaintiffs' logs were destined for, and were actually driven into, the Susquehanna boom, which was a mile or more above their mills, whilst the Loyalsock was a mile or more below. The plaintiffs had no desire to have their logs in the Loyalsock; if they had desired them to pass the Susquehanna boom, it was their duty to give notice as required by the seventh section of their charter; they preferred, however perhaps, that they might be caught there, rather than lost. If there had been no consolidation there could be no question. But the effect of the consolidation was to unite the com-

Mitchell v. Zimmerman.

panies only, not the booms; the consolidated company controlled each of them separately, "under the rights, privileges and immunities," and "subject to the restrictions, contained in the respective charters," some provisions of which are not common to both. In *Gould v. Landon*, 43 Penn. St. 365, the effect of the consolidation was considered by this court, and it was held that these separate statutes "must be interpreted separately, although both become the property of one company, and an act consolidating the two boom companies will not change the liability of either, under its act of incorporation, to deliver logs at its own boom, the boom in which they were caught." The duty of the defendants is discharged, if their booms are sufficiently strong, as required by the statute. They are bound to secure the logs destined for and driven into their respective booms, and for their failure so to do they are to be held rigidly responsible; but they are not bound when the structure is destroyed by the act of God, to pursue and capture the lumber upon the flood, under penalty of being held responsible for the loss of what might possibly have been recovered in the pursuit.

Judgment affirmed.

GORDON, J., dissented. Motion for a re-argument refused.

MITCHELL V. ZIMMERMAN.

(109 Penn. St. 183.)

Auction — evidence to vary conditions.

As between the seller and the purchaser of goods sold at auction, evidence is admissible to vary the conditions of the sale publicly stated.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

J. H. Jacobs, for plaintiffs in error.

C. H. Ruhl and *J. H. Rothermel*, with him, for defendant in error.

CLARK, J. The plaintiff in this replevin is a dealer in horses, in the city of Reading. On the 26th of February, 1881, he had a public auction sale of horses at the Drover's Exchange. The terms and

conditions of the sale, as they were verbally announced by the auctioneer, in the presence of the bidders, before the sale began, were "sixty days' note, with security, or six per cent off for cash, satisfaction to be given before stock is removed." The defendants purchased a horse at this sale, at and for the price of \$125. After the sale the horse was removed to the plaintiff's stable, where he remained until the evening of the same day, when the defendants, without the plaintiff's knowledge, removed him, leaving in its place another horse, which they had previously purchased from the plaintiff. This replevin is brought to recover the possession of the property thus removed.

It is certainly true, if nothing else were shown, or offered to be shown, on the part of the defendants, that they had no right to possess themselves of this property, until satisfaction had been given, according to the terms of the sale, as stated by the auctioneer. They had neither paid the money, nor given note, with security as by the terms they were required, and until this was done the right of property and of possession remained with the plaintiff.

But the defendants allege that these terms of sale were under an agreement made beforehand, waived as to them; that their purchase was made under a particular contract, not as to the price, but as to the terms of payment, which extended to them a special privilege over those bidders, and they claim that the purchase having been made upon the faith of this contract, the property was rightly removed in pursuance thereof.

As the errors assigned arise from the rejection of certain offers of evidence, the truth of the particular facts therein stated, and offered to be proved, must of course, for the purposes of this case, be assumed.

It is not denied that the price of the horse, which the defendants bought, was to be determined by the bids at the sale; in this respect the defendants were admittedly on an equality with all other buyers. but the defendants allege that special terms of payment had been particularly agreed upon, and that they had under these terms the right to remove the property at the time it was removed.

To establish this. David Mitchell being on the stand, the defendants proposed to prove in substance: That several weeks before the sale Zimmerman told the witness that if he would trade for a horse which the plaintiff then had, and that horse would not get "all right in his foot" he would in a few weeks have another supply.

Mitchell v. Zimmerman.

and he would then have one that would suit, and would exchange. That the parties did trade, the defendants giving \$75 difference; that the defendant took the horse home upon these terms, and kept him until the new supply arrived; that he then went to the plaintiff's stables and the plaintiff told him he would have a public sale of horses on that day; that the defendant should bid on a horse that would suit him, and if the price exceeded the price of the other horse which defendant had previously traded for (which horse was to be returned), the defendant was to pay the difference; if not, it was to be square. To be further followed by evidence that the defendant bid a horse off at \$125, took it home, and returned the other horse, and that the plaintiff then had \$75 of money from defendant, and \$45 which he had received for the first horse traded.

This offer was followed by another substantially as follows: That on the day of the sale of the horse in question, and immediately before it was offered, the defendant asked the plaintiff if he could have the privilege of bidding at the sale, with the understanding that if he should buy a horse higher in price than the defendant had given plaintiff in trade, some three weeks before, for another horse, defendant would pay the difference; if it would not bring more they would call it even, defendant to take away the horse he might purchase and return the other. That plaintiff replied: "Yes, that you can do," and with this understanding and agreement defendant purchased a horse at the sum of \$125, took him home and returned the other horse.

In subsequent offers it was proposed to show by the same witness, that a few days after the sale the plaintiff went to the defendant's house and said to him in the presence of several persons: "Now, Mitchell, you have a good horse, and you ought to be satisfied; but as the horse you now have cost me more money I ought to have a little more money: you ought to pay me \$25 or \$50 to make it even, but give me \$25 and we will call it square;" that Mitchell told the plaintiff, according to the price bidden at the sale for the horse which he now had, and the agreement they had together for his purchase, by the return of the other horse, he did not owe plaintiff any thing.

As these several propositions were of testimony to be given by a single witness, they may be considered as constituting a single offer; the court below, in ruling upon them, and in the opinion filed so considered them.

It is certainly true, as we have said, that under the terms of the auction sale, as verbally announced by the auctioneer, title would not pass to a purchaser until the price was paid or properly secured; the giving of a note with security or actual payment of the price, was made a condition precedent of the sale. *Welsh v. Bell*, 32 Penn. St. 12. But it was altogether proper to admit evidence to show that these verbal conditions were waived, in any particular case, either by an agreement beforehand or by a delivery afterward. The plaintiff had a right to make any contract he chose respecting payment, there was no writing between the parties, and it was certainly proper to permit the defendant to show what contract, in this particular case, he did make. *Prima facie*, the defendants' purchase was made subject to the condition, publicly stated, and the burden was clearly upon them to show that this was not so. For this purpose, we think, the evidence offered was admissible. As the action was replevin the real question in the cause was the right of possession, and this depended largely upon what the contract really was and what was done by the parties in pursuance of it. If the facts offered to be proved are true, it is clear that the contract, upon which the defendant's purchase was made, was not according to the general terms or conditions of the sale, but was exceptional in its character and distinct from the ordinary sales then made. The transaction was rather in the nature of an exchange; the defendants to pay the difference between the price of the horse they bought at \$125, and the price of another to be returned, out of which the plaintiff had realized \$120.

It is contended on part of Zimmerman however, that assuming the contract to have been as stated, the defendants do not offer to prove the payment of the \$5, and that until the other horse was returned, and this difference paid, the right of possession still remained in Zimmerman. Assuming that the case ended here, and that \$120 was the price of the horse to be returned, this might be so; but the defendants proposed to show that the other horse having been in fact returned to Zimmerman, they took possession of the purchased horse and removed it to their own stables; that for a "few days" the possession was retained without objection, and that until the bringing of this suit, the defendants' right to remove the horse was not in terms denied, on the contrary, that a few days after the sale Zimmerman went to the defendants' house, and in the presence of several persons said to him, "Now, Mit-

Mitchell v. Zimmerman.

chell, you have a good horse, and you ought to be satisfied, but as the horse you now have cost me more money. I ought to have more money; you ought to pay me \$25, or \$50, to make it even; give me \$25 and we will call it square." Under this offer, if admitted and established, the jury might well have inferred that the possession was rightly taken. If Zimmerman had at this time demanded the possession, and denied the defendants' right to remove the horse, until the terms of his purchase had been complied with, had agreed to accept \$25 in settlement of his claim, or indeed if he had said nothing, a different case would have been presented.

If the conditions of the auction sale as to the defendants were dispensed with, we must ascertain the real purpose of the parties in what they said and did. Contracts are executed, or executory merely, absolute or conditional only, just as the parties may intend; that intention must, in the first instance, of course, be ascertained from the terms of the contract itself; when it is not thus clearly manifested, it may be shown by the circumstances attending its execution, or appear in the conduct of the parties with reference to it. As the case is to be retried we do not desire to discuss the effect of the evidence; when the testimony is taken it may fall far short of the offers made, and any extended discussion of the case, as it is now presented, might have a misleading effect at the trial. We have said enough to indicate the principle upon which we think the evidence is admissible, and that is sufficient.

It is true that the statements contained in the several offers are specifically denied by the plaintiff, but this is of no consequence now; the truth of the matters alleged, on either side, is for the determination of the jury, when the whole case is presented.

We are of opinion that the offers, the rejection of which constitute the several bills of exception in this case, should have been admitted.

The judgment is therefore reversed and a *venire facias de novo* awarded.

Judgment reversed.

FOSTER V. RUNK.

(109 Penn. St. 291.)

Deed — reservation — “clays.”

An exception and reservation in a deed of all “metals and minerals,” etc., and of “all valuable earths, clays, stones, paints and substances for the manufacture of paints,” covers clay for making bricks.

COVENANT for royalty for bricks. The opinion states the point. The plaintiff had judgment below.

Frederick Bertolotte, for plaintiff in error.

Freyman & Kiefer, for defendant in error.

GORDON, J. Although there were a number of exceptions taken to the ruling of the court below which are here assigned for error, yet we regard the third point of the defendants below and the answer to it as embracing every thing that is material in this case. If Runk in fact owned the brick clay found upon the tract of land sold to Abby Bowman, then of course his lease to Tombler, the assignor of the defendants, was not only good when made, but by virtue of the holding over by the lessees, continued to run down to the time of the bringing of this suit.

In that case there was but one alternative left to Foster & Co., either to pay the rent according to the terms of the lease, or to turn out and abandon the premises to their landlord.

If the fact as above stated be established, then the question, whether they could or could not defend on the Abby Bowman lease, needs no consideration, and all points and assignments relating to it disappear from the contention as having no material relevancy to it. In that event, the answer to the defendants' first point, which affirms the insufficiency of the defendants' evidence to impeach Runk's title, must be regarded as correct.

What then was the character of that title? It is found in the reservation contained in his deed to Abby Bowman of December 9, 1863, and reads as follows: “and also all valuable earths, clays, stones, paints and substances for the manufacture of paints upon or under the said tract of land.” One would suppose that this was

broad enough to embrace brick clay, and the more so as "all valuable clays" are specially reserved.

But the ingenuity of counsel has devised two objections to this conclusion, plain and obvious as it seems to be. (1.) It is urged that the reservation is to be understood as only of that kind of clay from which paint can be manufactured. Such however is not the force of the language here made use of.

It may indeed be that the paint here spoken is a species of clay, and that as such it is "valuable," but clay is also valuable for the manufacture of brick, and as the reservation is of "all such clays," the question is not what may or may not be manufactured from it, but whether it is valuable for any purpose. Besides this, it is clearly manifest that the language here used is intended to distinguish "earths, clays and stones," from "paints and substances for the manufacture of paints."

In ordinary language clays and chromes or paints are substances altogether different, and no one not posted in mineralogy would suppose that the former included the latter. We cannot therefore agree to entertain the construction here attempted.

(2.) It is said that the reservation being as broad as the grant is therefore void, and the whole property vests in Abby Bowman. But neither can we entertain this proposition. From a technical and scientific standpoint undoubtedly the reservation embraces every thing that is the subject of grant. "All manner of minerals, substances, coals, ores, fossils, and also all manner of compositions, combinations, or compounds of any or all of the foregoing substances for the manufacture of paints," certainly embrace all things of an inorganic character, and technically would leave nothing for the grantee. But we cannot thus construe the contracts of ordinary people, for if we did so the intention of the parties would, as rule, be defeated. For such contracts the proper construction is that which is made by viewing the subject matter of the contract as the mass of mankind would view it, since it is most reasonable to suppose that such was the aspect in which the parties viewed it. *Schuylkill Navigation Co. v. Moore*, 2 Whart. 477; *Gibson v. Tyson*, 5 Watts, 34; *Dunham v. Kirkpatrick*, MS. Construing the deed before us by this, the only proper rule, and there is no doubt but that notwithstanding the very general character of the reservation, there was something left upon which the grant could operate, that the latter did not include the ordinary glebe, timber or waters.

Pennsylvania and New York Canal and Railroad Company v. Mason.

If however these and the like were not included in the reservation, that part of the deed must be considered as valid, and as continuing in the plaintiff the right to the minerals, clays and paints.

This establishes the validity of the lease of the brick clay to Tomblor, and as it is by virtue of that lease that the defendants hold the premises, it is certain that by its term they must abide.

Judgment affirmed.

PENNSYLVANIA AND NEW YORK CANAL AND RAILROAD COMPANY
v. MASON.

(109 Penn. St. 296.)

Master and servant — defective machinery — co-servants.

Where an engineer and fireman were killed by the explosion of a locomotive boiler which had been recently and insufficiently repaired in the shops of the railroad company, the company is not relieved from liability by the fact that the repairers and the deceased were fellow servants, although under the same superintendent. (*See note, p. 725.*)

ACTION for death of husbands by negligence. The opinion states the point.

Lewis M. Hall, Henry Streeter and William T. Davies, for plaintiff in error.

H. N. Williams, E. J. Angle, E. Overton, J. F. Sanderson, N. C. Elsbree, and *L. Elsbree*, for defendant in error.

GORDON, J. On the 26th day of April, 1880, in consequence of the explosion of a locomotive boiler belonging to the defendant below, John Leslie, the engineer, was killed outright, and Frank Mason, the fireman, was so injured that he died on the 4th of May following, and these actions were brought by their widows severally for damages resulting to them from the death of their respective husbands. As these actions are in all respects similar, they were, in this court, argued together, and for this reason we will dispose of both in the same opinion.

Certain questions which arose in the court below have been settled by the verdict; among others, the insufficiency of the boiler for the work it was intended to do, and the fact that Leslie and Mason

Pennsylvania and New York Canal and Railroad Company v. Mason.

did not by any act of commission or omission contribute to the accident. There were also certain legal principles recognized by the court below, about which there was and can be no serious dispute, as that the burden of proof was on the plaintiffs to show negligence on part of the defendant or its agents; that there could be no recovery if the accident resulted from the negligence of a fellow-servant; that this master was bound to furnish safe appliances and tools with which its servants might accomplish the work they were required to do, and that it could not be held liable if competent and careful mechanics were employed in the manufacture and repair of the boiler. In all these particulars, the court properly instructed the jury, and they would seem to cover the entire case. Nevertheless we have some assignments of error founded on exceptions taken to the rulings of that court.

We are told that it was a mistake for the learned judge to affirm the plaintiffs' first point because of its containing the word "adequately" as follows: "that the defendant company was bound to keep and maintain the engine 'Wyoming' in such a condition as to be reasonably and adequately safe for Mason the deceased, to be upon and use." But as according to Webster, "adequacy" means simply "sufficiency; sufficiency for a particular purpose," we cannot see where in this instruction there was error. The boiler ought to have been sufficient for the purpose intended, and if it was not the company was responsible for the absence of such sufficiency; indeed, in this alone the neglect, if any, is found. But the court below was asked by the counsel for the defendant to say that the workmen in the shop at Sayre, who repaired the boiler, were under the evidence fellow-servants with Leslie and Mason, and that there could be no recovery for the negligence of such co-employees. To this the court made answer as follows, "That is denied. It is true that Mr. Weaver testified that he had under him Slowey, who made these repairs, and he had also under him the engineer and fireman of the gravel train; and as Slowey repaired this engine by his direction, it is claimed on the part of defendant that because they were all under Weaver, therefore they were fellow-servants, and that if the engine was not reasonably, carefully, and well repaired, the plaintiff cannot recover, because Slowey and Mason were fellow-servants: I do not think it follows necessarily, because Weaver swears that he is the master mechanic of the shop, and I think that whatever was done under him would bind the defendant." We think this answer

Pennsylvania and New York Canal and Railroad Company v. Mason.

accords with the general tenor of our Pennsylvania decisions, and unless we propose a new departure, and conclude that the servant is to have no protection whatever from the carelessness of his master, we must support this ruling of the court below. How a boiler maker employed in a machine shop can be regarded as a co-employee with a fireman and an engineer engaged in running a locomotive on a railroad, in the sense of making the latter responsible for the negligence of the former, is something that is difficult to understand. The only possible connecting link between them was the superintendent, Weaver, but as he stood in the place of the defendant company in the department over which he was placed, he is not to be regarded as an employee but as a principal; *Mullan v. Steamship Company*, 78 Penn. St. 25; s. c., 21 Am. Rep. 2. What business had Leslie and Mason in or about the company's machine shop any more than they had about the shop of any other firm or individual? The boiler was condemned as unfit for use, and was taken from these men for the purposes of repair, and afterward, when it was supposed to have been made safe, it was returned to them and they were required to use it as a machine fit for the intended purposes. The fact was, as the jury found, it was not safe, and not fit for the use to which it was put; it blew up, and destroyed the lives of the men who had charge of it, and the question now is, upon whom is the blame to rest if not on the master? And how are Leslie and Mason to be charged with the negligence of men with whom they had not the remotest practical connection?

Are we to strain a point against these laborers and raise a theoretical connection between them and the boiler maker in order to shift the responsibility from the master to the servant? Neither on disposition nor authority can we approve a proposition so clearly wrong as this. Says Dr. Wharton in his work on Negligence, section 232: "A master is bound when employing a servant to provide for the servant a safe working place and machinery. It may be that the person by whom buildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be evaded by capitalists employing their own servants in the construction of buildings and machinery. In point of fact, this is the case with most great industrial agencies, but in no case has this been held to

Pennsylvania and New York Canal and Railroad Company v. Mason.

relieve the master from the duty of furnishing to his employees, material, machinery and structures, adequately safe for their work." The learned author, in support of what he thus propounds, cites, among others, the case of *Ford v. Fitchburg Railroad Co.*, 110 Mass. 240; s. c., 14 Am. Rep. 598, a case very much like the one in hand, and in which the duties of the master to his servants are well and ably stated by Mr. Justice COLT. It is there, as in many other cases, held that the legal rule which exempts the master from responsibility for accident resulting to those in his employ, or from those occurring through the neglect of co-laborers, does not excuse him from the exercise of reasonable care in supplying and maintaining suitable implements for the performance of the work required. Nor are those agents who are charged with the business of supplying the necessary machinery, to be regarded as fellow-servants, but rather as charged with the duty which the master owes to the servant, and the neglect of such agent is to be regarded as the neglect of the master. So is the employer equally chargeable whether the failure is found in the original tool, or machine or in a subsequent want of repair by which it becomes dangerous. There can indeed be no essential difference in these particulars, and the only question is, whether the defect from which the accident arose was known, or might, by the exercise of reasonable diligence, have been known to the master or his agents.

What has been above stated accords, we think, with the general tenor of our own authorities, and among others, *O'Donnell v. Railroad Co.*, 59 Penn. St. 241. We must therefore refuse to sustain the exceptions of the plaintiffs in error, and approve the rulings of the court below.

Judgment in each case affirmed.

NOTE BY THE REPORTER.—But in *Reading Iron Works v. Devine*, 109 Penn. St. 246, it was held that if the servant himself assisted in the repairs, and afterward, in using the machine, was injured by a defect due to the negligence of the others, who made the repairs, and to which he did not contribute, he cannot recover from the master.

See *Rogers v. Ludlow Man'g Co.*, 144 Mass. 144; *Rice v. King Philip Mills*, 144 Mass. 229.

SPARROW V. KOHN.

(109 Penn. St. 359.)

Statute — "transacting business" — partnership.

A firm in Philadelphia, having a branch house in New York, orally leased part of its premises situated in New York. The firm was doing business under the name of Kohn, Adler & Co., although there was no Adler in the firm. *Held*, that the leasing was not "transacting business," within the meaning of the New York penal statute forbidding the transaction of business in the name of a partner not interested in the firm.

ACTION for rent. The opinion states the case. The plaintiff had judgment below.

A. Sydney Biddle, J. Rodman Paul and Geo. W. Morris, for plaintiffs in error.

David Tim and Thomas J. Diehl, for defendants in error.

PAXSON, J. This action was brought to recover certain arrears of rent. The demised premises are situated in the city of New York, and the contract was made there. The defendant below resisted payment upon the ground that the verbal lease under which he held the premises was void under the statute of the State of New York, which prohibits any one from transacting business in the name of a partner not interested in the firm.

The plaintiffs below are a Philadelphia firm with a branch office in New York. The name of their firm is Kohn, Adler & Co., and at the time of this transaction Mr. Adler was dead, and there was no person of that name in the firm. In 1882, they rented a vacant portion of their building in New York to the defendants. Was this transacting business within the meaning of the New York statute? The learned judge of the court below held that it was not, and we see no reason to question the soundness of his ruling.

In construing a New York statute we naturally turn to the decisions of the courts of that State for light. We do not find a ruling upon the very point. The nearest approach to it is the case of *Wood v. Erie R. Co.*, 72 N. Y. 196; s. c., 28 Am. Rep. 125. It was there said by the Court of Errors and Appeals in considering this statute: "The act is highly penal, and will not be extended by

implication or construction to cases within the mischief, if they are not at the same time within the terms of the act fairly interpreted. We must also consider the purpose of an act of this character in construing the same, and the mischief it was designed to suppress. It is quite obvious that the object in view was to prevent an individual engaged in business from continuing to use the name of a member of the firm with whom such persons had been associated, after such member had retired from the concern, or of using the name of a person not interested in such firm, and thus to induce credit to be given by those trading with such persons, and to impose on the public. Such being the manifest object of the law, it evidently related mainly to dealings between the individual who used the name of the old firm, or of one not interested, and the person who transacted business arising out of said dealings with him. These would be mainly between the vendor and the vendee, or the employer and the employee, or the person who performed labor or rendered services, and the one for whom it was rendered. Business transactions between parties occupying such a relationship would clearly come within the operation of the statute referred to, and were intended to be embraced within its provisions. It was against fraud and imposition which might be practiced upon innocent parties who dealt with the persons who transacted business in the name of a party whose interest had ceased, or who never had any interest in the same, that the statute was directed. These were the evils intended to be remedied and clearly within the terms of the statute. Beyond this the statute cannot be extended by implication, or even by a liberal construction."

The case in which the foregoing language was used by Justice MILLER was in tort, and therefore essentially different in its facts from the one in hand. It is valuable however as being a well considered construction of the statute.

We are of opinion that in leasing this property the plaintiffs were not transacting business within the meaning of the New York statute. They were not real estate agents or brokers in any sense. They were in the millinery and straw goods business. The leasing of a part of their premises was not an ordinary incident of their business; it was done merely because it happened to be vacant. The act was never intended to cover such a case as this, and as it is highly penal we will not extend it beyond its plain object and meaning.

Judgment affirmed.

Merchants' National Bank of Philadelphia v. Goodman.

MERCHANTS' NATIONAL BANK OF PHILADELPHIA V. GOODMAN.

(100 Penn. St. 422.)

Banks — collections — agency — negligence.

A bank receiving for collection a check on a bank at another place, and intrusting it directly to that bank for payment, is liable to the depositor for loss by the failure of the drawee.*

ACTION to recover amount of a check. The head-note states the case. The plaintiff had judgment below.

ALLISON, P. J. Upon the foregoing statement of admitted facts, the majority of the court agree that judgment should be entered in favor of the plaintiffs on the case stated.

This conclusion is reached, whether the transaction is to be treated as the purchase of the checks by the Merchants' National Bank from the plaintiffs, the check having been received and credited by the bank as cash, or whether, under the terms of notice which appear on the first page of plaintiff's deposit bank book, the transaction is to be considered as a deposit of the check for collection on plaintiff's account. If the latter view be adopted, the defendants must be regarded as having advanced to the plaintiffs the amount of money for which the check called, until it could be ascertained whether it would be paid upon presentation to the Mississippi Valley Bank. In whatever light it may be viewed, the parties to this action stand to each other in the relation of indorser and indorsee, the indorsee being required to demand and entitled to receive payment from the maker of the check. The contention on the part of the plaintiffs is, that sending the check, to the bank on which it was drawn for payment, is not such a demand as will release the indorsee from liability to the indorser, when as it is here admitted, the bank to which it was sent for payment does not return the money for the check, nor the check itself, but cancels it on the theory that it has been paid, by charging the account of the drawer with the amount of the check, surrendering the possession of it to him, or at least entitling him to have it delivered up to him, as paid and cancelled.

* To same effect, *Drovers' Natl. Bk. v. Anglo-Am. Packing, etc., Co.* (117 Ill. 110), 57 Am. Rep. 855.

Merchants' National Bank of Philadelphia v. Goodman.

That it was regarded as having been paid, appears by the letter of the receiver of the Mississippi Valley Bank of December 4, 1883, which is made part of the case stated, in which he writes, "It was paid, charged to drawer's account and cancelled."

By reference to the notice, which appears in the first printed page of the case stated, it will be seen, that checks on banks of this city, connected with the Clearing House Association, would be received by the defendant bank only for collection on the depositor's account. The second clause of the notice provides, that on all other checks and drafts deposited as cash your (the depositor's) responsibility as indorser continues until payment has been ascertained by the bank.

Both classes of checks were required to be indorsed by the depositors; upon the first class such liability continued until the close of the business day next succeeding that on which such checks were deposited. And upon the second class, until payment has been ascertained by the Merchants' National Bank. The defendant therefore accepted the checks as cash, holding the plaintiffs as indorsers responsible to them in case it should not be paid on presentation to the bank on which it was drawn.

Whatever may have been the rights of the defendant as the holder of the check received under the circumstances set forth in the case stated, in the opinion of a majority of the judges, their duty under the law required them to forward it to a correspondent or sub-agent, with instructions to present the same for payment, and if payment was refused, to have had it protested and returned at once to the defendant. Had this been done the rights of all parties would have been protected. The conclusion is a legitimate one, that had demand been made by an agent of defendant bank, the money for the check would have been paid to such agent, whose whole duty would have been performed by transmitting the proceeds of the check to the defendant bank who would thus have secured the advance which it had made to the plaintiffs, and the transaction as to all parties concerned would have been properly closed out. It must not be overlooked that the duty which the defendant bank undertook to perform in connection with the collection of the check was voluntarily assumed; it cannot therefore complain if it is held not only to good faith, but also to the exercise of such diligence as would protect the rights of all parties. The law imposes no unreasonable obligation upon one who undertakes

Merchants' National Bank of Philadelphia v. Goodman.

to do that which the defendant in this case undertook to perform. The entire measure of that duty was to transmit to a responsible agent for collection, and this the defendant could have done, or declined the performance of the obligation, if it had no correspondent or agent to whom it could have transmitted the check for collection from the bank on which it was drawn. Or it could have declined to accept the performance of any act connected with the collection of the check, except as acting under the instruction and at the risk of the depositor. This the defendant did not do, but assumed the responsibility of sending the evidence of the plaintiff's right to have the money for which it called collected for their benefit to the bank which was expected to make payment. Not obtaining the money, but a worthless draft in return, the defendant treating the check as not paid, charged the amount of it back to the plaintiff's account, and when they called for the check, as the best evidence of their right to recover against the maker, they are informed, the check you call for cannot be returned; it was paid, charged to the drawer's account and cancelled.

We do not regard it as a fulfilment of the proper measure of the defendant's duty in the premises, that they sent the check to the Mississippi Valley Bank directly for payment; nor can we agree that a custom such as is here sought to be set up can be successfully pleaded as a defense by the indorser against the indorsee of a check, under circumstances like those which it is admitted exist in this case. That such a course is frequently adopted may be admitted, but when it is followed it is at the risk of the agent, who, of his own choice, transmits the evidence of indebtedness upon which the right to demand payment depends to the party who is to make the payment, instead of forwarding it to a sub-agent, with express or implied instructions to do all that is required by way of demand for payment, protest when payment is refused, and return the instrument to the party from whom it had been received.

The agreement to transmit for collection is a contract between the bank and the customer; the valuable consideration which supports the agreement as a contract is the use of the money to be collected by the bank so long as it shall be allowed to remain in their hands after it has been collected. This binds the collecting bank to do all that is incumbent on them to do, and that entire duty, as we have said, is discharged when the check or draft is trans-

Merchants' National Bank of Philadelphia v. Goodman.

mitted to a responsible sub-agent to collect money. The agent to whom the instrument is sent to make demand for payment, then becomes the agent of the depositor or indorser, and is liable to such depositor for loss arising from failure on his part to perform the duty which is incident to an undertaking to collect the money; and such duty is not discharged when any thing but money is accepted as payment, in the absence of special authority to the contrary. The law, as we have stated it, is well settled on the authority of decided cases in this country. In the State of New York, only, does a different rule prevail. There on the authority of *Allen v. Merchants' Bank of New York*, 15 Wend. 482, and 22 Wend. 215; s. c., 34 Am. Dec. 289, it is held that the agents at the place of collection are the agents of the bank receiving the deposit, and not of the depositor.

In our own State the principle has, in several instances, been maintained that a collecting bank is an agent for transmission to a sub-agent to collect, and when this is properly done, its duty is performed and its responsibility is at an end.

In the case of *Mechanics' Bank v. Earp*, 4 Rawle, 386, the undertaking was to transmit the bills with instructions upon them to their correspondents. The court held the defendants did not undertake to collect the bills, but were used as the medium of communication between the depositors and the collecting bank in Virginia. In *Bellemire v. Bank of United States*, 4 Whart. 105; s. c., 33 Am. Dec. 46, GIBSON, C. J., says: "In the case of *Mechanics' Bank v. Earp*, it has been ruled that a bank, employed to transmit for collection, is bound to concern itself with the act of transmission alone, and that its correspondent becomes the agent for subsequent measures." What the bank undertook to do was to put the note in the ordinary channel of collection, and it performed its undertaking, when for the purpose of presentation and notice, it put it into the hands of its own notary. In *Wingate v. Mechanics' Bank*, 10 Penn. St., 104, the same doctrine is asserted, recognizing the authority of the *Bank v. Earp*, *supra*. In *Bradstreet v. Everson*, 72 Penn. St. 124; s. c., 13 Am. Rep. 665, the rule is again recognized, but that case was held not to come within the rule, because the agreement was that of an attorney undertaking the collection of the demand by the express terms of the receipt.

The leading case perhaps on this subject is that of *Bank of Washington v. Triplett*, 1 Pet. 35, in which MARSHALL, C. J.,

Merchants' National Bank of Philadelphia v. Goodman.

says: "That Triplett having deposited a bill with a bank in Alexandria to be collected in Washington, the Alexandria Bank forwarded the bill to the bank of Washington, which by negligence, failed to collect the bill." By transmitting the bill, as directed, the bank with whom it was deposited performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for the purpose. To the same effect are 23 Pick. 330; 1 Cush. 182; 12 Conn. 303; 25 Ill. 247; 91 U. S. 308.

The weight of authority preponderates greatly in support of the doctrine that it was the duty of the defendant to transmit to a suitable agent to collect, and it seems to us that the Mississippi Valley Bank, on whom the check was drawn, was in no sense a suitable agent to demand payment against itself; its interest plainly was to delay instead of speeding payment. The defendant put it in the power of the Mississippi Valley Bank to do what it pleased with the check, and that which it did please to do, on the eve of insolvency, was to cancel and surrender the check, and to transmit, not money, but a worthless draft in payment.

We think the principle may be stated as a true one, as the plaintiff's counsel have presented it, that no firm, bank, corporation or individual, can be deemed a suitable agent, in contemplation of law to enforce in behalf of another a claim against itself.

The only safe rule is to hold that an agent, with whom a check or bill is deposited for collection, must transmit to a suitable sub-agent to demand payment in such manner that no loss can happen to any party, whether he be depositor and indorser or the indorsee and holder. In this instance, had the demand for payment been made by such agent, the amount of the check would have been collected over the counter of the Mississippi Valley Bank. It was doing business on the 19th day of November, 1883, and the cancellation of the check on that day shows there was money of the drawer in the bank sufficient to pay the check.

We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment, to hinder, postpone or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself

 Cheraw and Salisbury Railroad Company v Broadnax.

by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril.

Christopher Stuart Patterson, for plaintiff in error.

Samuel B. Huey and *J. R. Adams*, for defendant in error.

STERRETT, J. For reasons fully and clearly expressed in the opinion of the learned president of the Common Pleas, we are satisfied the judgment of that court in the case stated is correct.

MERCUR, C. J., dissented.

Judgment affirmed.

 CHERAW AND SALISBURY RAILROAD COMPANY v. BROADNAX.

(109 Penn. St. 432.)

Ship and shipping — general average bond — unseaworthiness.

In an action on a general average bond it is a good defense that the loss was occasioned by the unseaworthiness of the vessel.

ACTION on a general average bond. The opinion states the case. The plaintiff had judgment below.

Geo. Tucker Bispham and *George Junkin*, for plaintiff in error.

Alfred Driver and *B. F. Gilkeson*, and *J. Warren Coulston*, for defendants in error.

CLARK, J. This is an action upon a general average bond, made by the defendants, the Cheraw and Salisbury Railroad Company, to the plaintiffs, who are the owners of the schooner "Mattie A. Hand." This schooner on the 9th of January, 1880, sailed from Philadelphia, bound for Charleston, South Carolina, with a cargo consisting of canned goods, paint, putty and steel rails. The steel rails, weighing 545 $\frac{6}{16}$ tons, valued at \$38,171.56, had been purchased by and were consigned to the defendants. From the recitals of the defendant's bond and other evidence in the cause, it appears that on the 21st of January, whilst in the prosecution of the voyage, the wind from the north-east and a chopping sea caused the vessel to labor heavily, and upon sounding the pumps it was found that

Cheraw and Salisbury Railroad Company v. Broadnax.

the vessel had sprung a leak at the rate of one hundred strokes per hour, which gradually increased to four hundred, it was deemed unsafe to continue the voyage, and after due consideration the master of the vessel bore up to Norfolk for the general benefit.

The cargo, upon the recommendation of the surveyor of the port, was discharged, the vessel was repaired and re-loaded, and again proceeded on her voyage. On the 12th of April, 1880, in a chopping sea, she again sprung a leak at the rate of four hundred strokes per hour, which continued to increase; finding it unsafe to prosecute the voyage the master finally bore up for and arrived back at Hampton Roads on the 13th of April, and on the 14th put into Norfolk for further repairs. The schooner afterward set out for Charleston, where she arrived safely in the latter part of April, 1880. Captain Hearon was in command of the schooner between Philadelphia and Norfolk, and Captain Jarvis between Norfolk and Charleston.

Upon the arrival of the schooner at Charleston, Captain Jarvis, before delivering the cargo of steel rails, had the bond in suit executed by Mr. Ravenel, president of the company defendant. The master of the vessel thereupon submitted the loss to John R. Heriot, adjuster of marine losses, named in the bond, who on the 7th of May, 1880, made the general average adjustment, in evidence, finding for contribution by the defendants upon their cargo of steel rails, the sum of \$1,939.38, the amount of the plaintiff's claim in this case. After the adjustment had been made the master of the vessel presented it to Mr. Ravenel, who made no objection, but claimed that the law allowed him thirty days in which to pay it. The defendants afterward refused to pay the bond, and this foreign attachment was issued, attaching in the hands of the Insurance Company of Pennsylvania, garnishees, the amount of the insurance, which the defendant had placed upon the cargo. At the trial the bond and the adjustment, together with the bills covering the expenses incurred at Norfolk, were offered and received in evidence without objection.

General average is a doctrine growing out of the casualties of a mercantile voyage, and is built upon the plainest principles of justice. When sacrifices are made, either of the ship or of the cargo; extraordinary expenses incurred, or damages sustained, voluntarily, in the course of the voyage to save the whole adventure. the property rescued from the fury of the storm, or other impending peril of the sea, to which all the interests were exposed, must

 Cheraw and Salisbury Railroad Company v. Broadnax.

upon a general average bear its proportion of the loss. "Claims of this kind," says Mr. Justice CLIFFORD, in *Hobson v. Lord*, 92 U. S. 399, "have their foundation in equity, and rest upon the doctrine, that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice;" the loss therefore falls upon the ship, the cargo and the freight.

So if a ship be injured by a peril of the sea, and be obliged to go into port to refit, the necessary expenses of unloading, warehousing and re-loading the cargo, are properly brought into general average, for all persons concerned are interested in the completion of the voyage. *Plummer v. Wildman*, 3 M. & S. 482; *Power v. Whitmore*, 4 M. & S. 141; *Union Bank v. Union Ins. Co.*, Dudley L. & E. 171; *Abbott Shipping*, 280; 3 Kent Com. 236; *N. Am. Ins. Co. v. Jones*, 2 Binney, 547.

We do not understand the defendants to deny that the various matters embraced in the adjustment, are proper subjects of general average, if the innavigability of the vessel, in fact, resulted from the perils of the sea; their contention is that the vessel was unseaworthy at the commencement of the voyage, and the several assignments of error relate, in part, to the exclusion of evidence tending to establish that fact, and in part, to the refusal of the court to instruct the jury that the plaintiff could not recover under the pleadings, until the seaworthiness of the vessel was first established.

It is a general rule that where a jettison is rendered necessary, or extraordinary expense is incurred by the original unseaworthiness of the ship, or the negligence or faulty conduct of the master or crew, the owner of the ship is responsible for the entire loss, not merely for his share of it as a general average. Lowndes General Average, 38. But it is a well-settled principle that seaworthiness of the ship is not a condition precedent to the shipper's liability for general average, although if the loss was caused by it, that would constitute a good defense. *Schloss v. Heriot*, 14 C. B. (N. S.) 59. Under a marine policy on ship, freight or cargo, the fitness of the vessel for service, in the absence of any contrary provision, may be an implied condition, but in contracts of affreightment, no such condition exists. In the latter case however there is perhaps an implied contract on the part of the ship owner that the ship is tight. *Abbott Shipping*, 224; *Lyon v. Mells*, 5 East, 428; *Putnam v. Wood*,

Cheraw and Salisbury Railroad Company v. Broadnax.

3 Mass. 481; but that it is tight is the *prima facie* presumption. *Myers v. Girard Ins. Co.*, 96 Penn. St. 195, and if it be not, unless the loss occurs in consequence of unseaworthiness, the doctrine of general average will apply. The averment in the plaintiff's declaration, that the schooner was staunch and seaworthy, was under the implication arising out of the contract of affreightment, a proper one; perhaps it was not essential, but it did not require any proof in the first instance in support of it. There are affirmative averments, deemed essential in formal pleading, which stand upon the presumption of their truth until that presumption is rebutted; for example, in an action for defamation, the good repute of the plaintiff is always averred, but need not be proved until it is attacked.

The execution of the bond was shown; the adjustment was proven to have been made in accordance with the laws and usages of the port of destination, and it cannot be doubted, that the bond with its recitals and the adjustment made pursuant thereto, constituted a *prima facie* case for the plaintiff. The court was right, we think, in refusing to charge the jury that the plaintiff was bound to prove the seaworthiness of the vessel, as a condition of his recovery.

But it was competent, we think, for the defendants, notwithstanding the execution of the general average bond, and the adjustment and apportionment of the loss, to have shown that the unseaworthiness of the vessel caused the extraordinary expense incurred at Norfolk.

The master has a possessory lien upon the cargo, *Hobson v. Lord*, 92 U. S. 405, and he may either retain it until the contribution is secured by bond, or enforce it in admiralty, like the lien for freight. *Cutler v. Rao*, 7 How. 729; *Dupont de Nemours v. Vance*, 19 How. 62. In the case of a general ship, where there are many consignees, the English practice is for the master, before delivering the goods, to take a bond from the different merchants for payment of their portion of the average, when the same shall be adjusted. *Abbott Ship.*, part 3, ch. 8, § 17; and it has been held in this country that as the right is founded in commercial usage, the captain may make the giving of the average bond a condition of the delivery. *Cole v. Bartlett*, 4 La. 130. But the obligor might, we think, set up want of consideration, fraud, or mistake as a defense to the payment of it, as to the payment of any other bond. If the loss was in fact not occasioned by some peril of the sea, but by the misconduct of the master, the bond could have no consideration whatever to support

 Cheraw and Salisbury Railroad Company v. Broadnax.

it, and it would certainly be competent to defend against it upon that ground.

In *Strong v. New York Firemen's Ins. Co.*, 11 Johns. 323, it was declared to be the duty of the master, in cases proper for a general average, to cause an adjustment to be made upon his arrival at the port of destination, and that he had a lien upon the cargo to enforce payment of the contribution. When the general average is thus fairly settled in the foreign port according to the usage and law of that port, it is binding and conclusive as to the items, as well as to the apportionment thereof upon the various interests, though settled differently from what it would have been in the home port. 3 Kent Com. 244. If however it was not a proper case for a general average and was a partial loss only, the adjustment assuming a case for general average when none existed is not binding. *Lenox v. United Ins. Co.*, 3 Johns. Cas. 178; *Powers v. Whitmore*, 4 M. & S. 141; 3 Kent Com. 214. In *Chamberlaine v. Reed*, 13 Me. 357; s. c., 29 Am. Dec. 506, which was an action between the owner of the goods shipped on board a vessel as freight and the master of the vessel, it was held that an adjustment and general average of a loss made on the protest and representation of the master, did not preclude the owner from showing that they were not liable to contribution because the loss was occasioned by the culpable negligence or want of skill of the master. The legal operation and only effect of the bond and the adjustment is in each instance, we think, to fix the measure of the defendants' liability, and secure payment of the amount, unless it shall afterward appear that it was not a case for general average.

Assuming the right to impeach the bond for want of consideration, the defendants offered to show by the deposition of James S. Edwards and other witnesses, that the schooner *Mattie A. Hand* at and before the time of her departure from the port of Philadelphia on the voyage described in the *narr.* was unseaworthy. The offer was in direct proof of the defendants' first special plea. It may be that this plea, even if sustained by the proof, is insufficient in law to bar the plaintiff's recovery; if the plaintiff thought it insufficient he should have demurred, but he joined issue and went to trial upon it, and he cannot prevent that from going to the jury, on part of the defendants, which tends to prove the issue thus formed. If a party accepts an issue tendered, the question thus raised is one that must be tried and upon which evidence is neces-

Shisler v. Baxter.

sarily admissible. In *Howell v. McCoy*, 3 Rawle, 256, it is held that the plaintiff has a right to support his cause of action by proof of the facts, stated in the declaration, and this can only be prevented by a demurrer, which admits the truth of the facts as set forth. The defense, if any he has, will avail the defendant, when the whole case is before the court and jury, by a direction on the law, arising on the facts. In *Moore v. Houston*, 3 S. & R. 175, Chief Justice TILGHMAN says: "If the question were simply whether the judgment of the Court of Common Pleas should be reversed or affirmed, there would be little difficulty in deciding it. If any of the rejected evidence was competent the judgment cannot stand. And without doubt part of it was competent, because it was in direct proof of the defendant's plea, and therefore admissible, whether it was matter sufficient in law, to bar the plaintiff's action or not. If the plaintiff thought it insufficient to bar him he might have demurred; but having joined issue, he cannot prevent that from going to the jury which tends to prove the issue on the part of the defendant." *Rawlins v. Danvers*, 5 Esp. 38; *Thompson v. Barclay*, 27 Penn. St. 263; *Philadelphia & Reading R. Co. v. Ervin*, 89 Penn. St. 71; *Seymour v. Hubert*, 92 Penn. St. 499, are cases in support of the same principle. The exclusion of the evidence offered was in our opinion erroneous.

The questions on cross-examination as to the rotten timber being found in the vessel at Norfolk were rightly refused, they were not upon matters proper for cross-examination, and the answers were inadmissible at that stage of the case.

The first, second and fourth assignments of error are not sustained, but upon the third assignment the judgment must be reversed.

Judgment reversed and a venire facias de novo awarded.

SHISLER v. BAXTER.

(109 Penn. St. 443.)

Sale — warranty — when not implied.

The plaintiff, a market gardener, bought Wakefield cabbage seed, of the defendant, in 1881, which produced a good crop. The next year he asked him if he had "any more Wakefield cabbage seed, same as in 1881." The defendant replied that he had some of the old stock, and produced some seed in

Shialer v. Baxter.

envelopes, part of the old stock, which the plaintiff bought. It was impossible to distinguish Wakefield cabbage seed by its appearance. The plaintiff planted the seed, and the crop was not Wakefield cabbage, and was almost worthless. *Held*, that the defendant was not liable in damages.*

ACTION for damages for implied warranty of seed. The head-note states the facts. The defendant had judgment below.

William W. Willbank and *James Crowe* and *Henry Reed*, for plaintiff in error.

Frank S. Simpson, for defendant in error.

MERCUR, C. J. In this case there is no evidence of any intended fraud or deceit by the vendor, nor of any express warranty. Mere representations as to the quality of the article sold do not constitute a warranty. *Wetherill v. Neilson*, 20 Penn. St. 448; nor in itself is it evidence of a warranty. *McFarland v. Newman*, 9 Watts, 55; s. c., 34 Am. Dec. 497. Unless there be fraud or warranty the purchaser takes the risk of the quality. *Whitaker v. Eastwick*, 75 Penn. St. 229. So in a sale of personal property on inspection, and where the vendee's means of knowledge are equal to the vendor's, the law does not presume an engagement by the vendor that the thing sold is of the species or kind contemplated by the parties. *Lord v. Grow*, 48 Penn. St. 88. That case is very similar to the present. There the intention was to buy and to sell spring wheat, but the kind actually delivered turned out to be winter wheat. The purchaser claimed to recover on an implied warranty that the wheat sold was spring wheat, but this court held otherwise. Among the numerous authorities leading to the same conclusion are: *Fraley v. Bispham*, 10 Penn. St. 320; s. c., 51 Am. Dec. 486; *Selser v. Roberts*, 105 Penn. St. 242; *Ryan v. Ulmer*, 108 Penn. St. 332.

In the present case the purchaser asked for the seed which the vendors had kept over from the previous year. The latter thereupon laid out on the counter before the purchaser some of the papers containing the seed. They were the identical packages remaining over from the previous year. Each party had an equal opportunity of inspecting them.

* See *Best v. Flint* (58 Vt. 543), 56 Am. Rep. 570; *Poland v. Miller* (95 Ind. 887), 48 Am. Rep. 730; *Jones v. George* (66 Tex. 149), 42 Am. Rep. 689.

 Pennsylvania Coal Company v. Winchester.

Although the declaration charges a false and fraudulent sale by the vendors, yet no evidence was given tending to prove any fraud or intended deceit, nor is any averred here. They sold it just as they had bought it, in entire good faith. The vendee had just as much knowledge in regard to the kind and quality of the seed as they had. In such case, in the absence of express warranty, the exemption of liability of the vendors is too well settled to need any further citation of authorities.

Judgment affirmed.

 PENNSYLVANIA COAL COMPANY V. WINCHESTER.

(109 Penn. St. 572.)

Water and water-courses — patent — right to minerals under bed of stream — island.

A patent entitling the patentee to coal and minerals under the bed of a navigable river from low-water mark on one shore to the same line on the other, does not entitle him to the minerals under an island within the bounds of his patent, which was subject to application and sale under laws existing before the law under which his patent was granted, and still in force.

EJECTMENT. The head-note states the point. The plaintiff had judgment below.

Andrew H. McClintock and Henry M. Hoyt, for plaintiff in error.

Henry W. Palmer and George K. Powell and D. L. Patrick, for defendants in error.

TRUNKEY, J. Prior to 1848, statutes had been enacted providing for application, survey and grant of islands in the river Susquehanna. They were not subject to appropriation at the prices paid for other lands, but the value of each was to be ascertained by the board of property, and in no instance to be sold for less than eight dollars by the acre. What shall be deemed an island for purpose of sale by the Commonwealth, is defined in the statute; it must "be at least four feet high above common low water, containing at least forty perches of ground exclusive of rocks, be susceptible of cultivation in grain or esculent roots in common seasons, by their growing and becoming maturely ripe." Sand or gravel bars, or ac-

Pennsylvania Coal Company v. Winchester.

cumulations of mud, which do not come under said description, shall be a part of the public highway. No warrant of survey shall be for a less quantity than the whole of the island — the sale and grant cannot be limited to the ground, exclusive of rocks, susceptible of cultivation in grain or esculent roots.

The act of April 11, 1848, provided for application, survey and grant of a quantity not exceeding one hundred acres of the bed of any navigable river, beginning at a point designated in the application, at low-water mark on the bank of said river and pursuing the course of said river at low-water mark to a designated point, thence at right angles across said river to low-water mark, thence along the shore at low-water mark to a point opposite the place of beginning. A warrantee under this act has the "right to dig and mine for iron, coal, limestone, sand and gravel, fire-clay and other minerals," but he takes no title to the soil or sand or any thing in the bed of the river. His grant is confined within the limits of low-water mark, and this recognizes the principle that a grant of land by the Commonwealth, bounded on one side by a large navigable river, vests in the grantee the entire land to the line of low-water mark. The riparian owner has the right of soil to ordinary low-water mark of the river, subject to the public right of passage for navigation, fishing and other proper use of the highway to the mark of ordinary high water. *Wood v. Appal*, 63 Penn. St., 210. Between high and low-water mark, the title of the riparian owner is qualified, being subject to the right of navigation over it and improvement of the stream as a highway. *Wainwright v. McCullough*, 63 Penn. St. 66. In that case it was said that the land lying between the low-water line of the island as fixed by the commissioners, and the top of the island bank, is a part of the island. And in *Hartley v. Crawford*, 82 Penn. St. 478, it was again remarked that the riparian rights of the owner of an island attached to the land between the bluff bank to which the survey came and the ordinary low-water mark; and subject to the rights of the public, the owner of the island might use the sandy or pebbly beach or shore. Although the principle may not have been necessary to the decision in *Wainwright v. McCullough*, or in *Hartley v. Crawford*, and therefore not authoritatively ruled, its assertion shows how naturally it comes into view in considering the bounds of an island as defined in the statutes providing for sales of that kind of land. No difference is made in the laws providing for

surveys and sales of land, respecting the shore of the main land and the shore of islands. It would be difficult to conceive a reason for a difference. In either case, the river being a bound, the grantee takes to low-water mark, subject to the right of the public to use the river as a highway, but as to all below the surface, without clog or qualification. If the title to any of the land remained in the Commonwealth, a grant of the minerals under the bed of a river, within the limits of low-water mark, would be held as strictly within said limits as if all the land bordering on the river had been disposed of to purchasers. So also if the act of 1848 does not apply to minerals under islands in the river Susquehanna, then owned by the Commonwealth said islands embrace all within the limits of low-water mark.

The act of 1848 contained no repealing clause, and repealed no prior statute by implication, unless there was such positive repugnancy between its provisions and the prior statute, that they cannot stand together or be consistently reconciled. It is general, applying to all navigable rivers, and the statutes relating to sale of islands in the river Susquehanna apply to no other; but the repugnancy between a local statute and a subsequent general statute must be as strongly marked, to say the least, to repeal by implication, as if both were general. *Sifred v. Commonwealth*, 104 Penn. St. 179; *City of Harrisburg v. Sheck*, 104 Penn. St. 53. No mention is made of islands in the act of 1848. On its face, the warrantee is entitled to the minerals under the bed of the river, without exception. Of course it was not intended that he should have a right to dig and mine and carry away the minerals in the islands which had been already granted. The presumption is against an intent to invade vested rights of property. Then the statute must be so construed that the bed of the river between the shores of the main land shall not include land, called islands, which had been previously granted to purchasers under the laws of the State. It seems equally clear that by like construction, it shall not include islands which under prior existing laws were subject to application and sale. Those laws provided for the sale of land, without exception of any part thereof; the act of 1848 provided for the sale of minerals under a river bed — under land covered with water. The purpose of the former was a sale of the entire land; of the latter, a sale of only the minerals under the surface. Title to the surface remains in the Commonwealth as to all grants under the

Delaware, Lackawanna and Western Railroad Company v. Sanderson.

act of 1848. There is no intent that said act shall apply to any land or island which was subject to sale under other laws. We are not convinced that the court erred in any of the rulings set forth in the first six specifications of error.

[Omitting minor points.]

Judgment affirmed.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY
v. SANDERSON.

(109 Penn. St. 532.)

Contract — lease or sale — coal in mine — taxes.

A. agreed in writing with B., "leasing" to him, all the coal beneath the surface of a certain tract of land" owned by A. B. covenanted to mine and pay "royalty" for a certain number of tons every year whether mined or not. There were provisions for distress and forfeiture. The agreement was "perpetual until all the coal was mined," and it extended to the heirs, executors, administrators and assigns of the parties. B. covenanted to pay the taxes on all the coal mined. *Held*, not a lease, but a sale of all the coal in place, and that B. was liable for all the taxes thereon.

ACTION to recover taxes paid. The facts sufficiently appear in the head-note and opinion. The defendant had judgment below.

Geo. R. Bedford and J. Vaughan Darling, and E. P. Darling, A. T. & A. H. McClintock, for plaintiffs in error.

George Sanderson, Jr., for defendants in error.

TRUNKY, J. These plaintiffs were not parties in the case of *Sanderson v. City of Scranton*, 9 Out. 469, and therefore are not bound by the adjudication. The sole question in that case is the controlling one in this, namely, whether the deed dated May 10, 1875, by Sanderson and others to Jermyn, "is a lease, properly so called, or virtually a sale of the minerals in place." Notwithstanding the very able and ingenious argument of the plaintiffs' counsel we are not convinced that there was error in the interpretation of the deed. Nothing can be added to the opinion of Justice CLARK

Delaware, Lackawanna and Western Railroad Company v. Sanderson.

in support of the conclusion "that there was such a severance of the surface from the underlying strata as created a divided ownership in these distinct portions of the land."

It may not be amiss to remark some of the points of the plaintiffs' argument. At present no question arises respecting the grantors' security for the purchase-money, nor of their power to subject their right under the deed to the lien of a mortgage. Nor is it a part of the case that the great body of coal lands in the Commonwealth are held under similar instruments. And if they are so held the real question remains as to the nature of the estate vested in the grantees.

In this instrument the operative word of the grantee is "lease," which signifies to grant the temporary possession of the subject, but in another part it is provided how long that possession shall continue. "In consideration of the grant or lease aforesaid" the grantee or lessee agrees to pay a certain sum per ton; the mode of ascertaining the number of tons, the times of making payment, and the minimum quantity to be paid for annually, are well defined. The money to be paid is called "payment," "price or royalty," and "royalty," but the meaning would be the same were the price to be paid for the coal called "rent." The stipulated remedies in case of default in payment are consistent with either a sale or lease, but were the instrument a lease some of them would exist if not therein expressed. When the parties omit to name a term, do not create a lease at will, nor a lease for life, though much of their contract is expressed in words peculiar to a lease, the whole instrument must be taken into view to ascertain the intent. Where it is clear that the owner of a tract of land grants the right to take all the coal beneath the surface, and the grantee obligates himself to mine and remove all said coal and to pay a certain price per ton each month for all coal mined, not less than a named quantity to be mined and paid for every year, the contract to be binding until all the coal under the tract is mined, and the rights, covenants and obligations are made binding on the parties, their heirs and assigns, and executors or administrators, there is an actual sale of the coal. It is none the less a sale, if the parties called the deed a lease, and styled themselves lessor and lessee, and contracted that in case of non-payment of the "royalty" the grantor should have the right of distress, or at his option the right to forfeit the grant. A deed on such terms is not a lease at will, nor for a term of years, nor for life. It cannot be limited to the life of the grantee, for should all

Delaware, Lackawanna and Western Railroad Company v. Sanderson.

the coal not be mined at the time of his death, his rights and obligations do not die with him.

Leases are generally for a term of years. If for a long term, as a hundred years, though of greater value than if for the life of the grantee, the estate is inferior. The entire body of coal under a tract of land may be embraced in a lease, and the term be so long that in all probability the lessee will mine the whole of the coal. Yet a term of years is a chattel, a transient interest in the land. A lease for the life of the lessee vests in him a freehold. A lease of a mine, whether for a term of years or for life, implies the possibility, if not the probability of its reversion. That the mineral may be partly or wholly exhausted before the end of the term is a result involved in the contract. It is not pretended that the instrument in question is a lease for life. No particular period is named for the duration of a tenancy. Then if it is a lease the tenancy is from year to year. Such tenancy is contrary to the plain intent. The subject of the grant is coal, nothing else save some necessary incidents for mining, and when the grantee shall have performed his covenants there can be no reversion.

It may have been believed, as the plaintiffs allege, that instruments of this character, by settled construction, are mere leases, but we have not been advised of the authority settling such construction. In support of this allegation it is said that these instruments have been recognized as leases in the body of our statutes, and reference is made to the act of April 27, 1855, P. L. 369, and its supplement of April 3, 1868, P. L. 57, relative to the mortgaging of leaseholds; but that statute expressly applies to "every lessee for a term of years." It embraces no lease that vests a freehold. Nor an absolute grant of the whole body of mineral. Again it is averred that judicial recognition of such instruments as leases has been distinct and emphatic, and reference is made to *Miners' Bank v. Heilner*, 47 Penn. St. 452; *Effinger v. Lewis*, 32 Penn. St. 367; *Offerman v. Starr*, 2 Penn. St. 394; s. c., 44 Am. Dec. 211; *Griffin v. Fellows*, 82 Penn. St. 114; *Greenough's Appeal*, 9 Penn. St. 18; *Trout v. McDonald*, 83 Penn. St. 144, and *Winton's Appeal*, 97 Penn. St. 385. Each of the first four of these cases related to a lease expressly for a term of years, *Greenough's Appeal* to a lease determinable on one month's notice by either party, and in each of the last two cases no question was made respecting the nature of the instrument, and the report does not show that it was not a

Delaware, Lackawanna and Western Railroad Company v. Sanderson.

lease for years. These cases seem to have no bearing upon the proper construction of the instrument in hand. They recognize the fact that a valid lease may be made of a mine; here the defendants deny that the mine was leased.

In *Sanderson v. City of Scranton*, the right of the owner of a tract of land to lease all the coal under the surface is not gainsaid. Nor is it alleged that in *Scranton v. Phillips*, it was decided that the instrument was not a lease, but the remark of the chief justice was referred to as evidencing that it was deemed more than a lease. In the late case of *Slough-ton's Appeal*, 88 Penn. St. 198, the instruments were leases, each was for a term of years, of land for the purpose of producing or mining oil. It was held that the guardian of a minor, without the approval of the orphans' court, had no power to lease the lands of his ward for mining purposes, as in effect it would be a grant of a part of the *corpus* of the ward's estate. One of the leases having been properly approved, was held valid. The validity of leases of mines has been uniformly recognized by the courts in this Commonwealth. There is a marked difference between a chattel and a freehold—estates created by leases are not all of the same nature. Where by the terms of the deed the ownership of the mineral therein described is vested in the grantee, he is entitled to the benefits and is subject to the burdens incident to its ownership.

It is contended that even if there was a sale of the coal, the provision in the deed relative to taxes on the mined coal implies that the grantors shall pay the taxes on the unmined. The plaintiffs say that at the time of the execution of the deed there had been a tax upon the coal itself when mined, and doubts existed whether the tenant was not authorized to deduct such tax from the royalty or rent. This explains why the provision was inserted. At that day probably the parties had no thought that unmined coal was taxable as real estate separate from the surface. Their intent must be ascertained from the language in the deed. They meant to insert many covenants similar to covenants usually inserted in leases. In a matter of so much importance had they intended to create a leasehold—a chattel—they would have limited the estate to a "determinate period." "The estate of a lessee for years is called a term, *terminus*, because its duration is limited and determined; for every such estate must have a certain beginning and a certain end." Where the subject and purpose of the grant

Landis v. Roth.

involve the mining and removing of the entire thing granted, to be held by the grantee and his heirs until it shall be so mined and removed in accord with his covenants, how can it be said that he takes a term? What can be more uncertain than the date when the subject shall be exhausted? What greater estate in the mineral underlying the surface of a tract of land, can a man have than the right in himself, his heirs and assigns, to mine and remove the whole of it? If his title is burdened with covenants and conditions insuring his payment of the purchase-money, the burden does not affect the nature of the estate.

We are of opinion that there is no express or implied covenant obligating the grantors to pay the taxes assessed on the coal as land, the property of the plaintiffs.

Judgment affirmed.

LANDIS v. ROTH.

(100 Penn. St. 621.)

Statute of limitations — new promise — sufficiency.

A new promise, to revive a debt barred by the statute of limitations, must identify the debt explicitly and certainly. (*See note, p. 749.*)

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Franklin March and George W. Rogers, for plaintiffs in error.

J. Wright Apple and Charles Hunsicker, for defendant in error.

PAXSON, J. The only question in this case is, whether there was a sufficient acknowledgment of the debt to take it out of the statute of limitations. The testimony relied upon for that purpose was that of the plaintiff below. He said: "When I got to Henry Landis, I said, I come for money, and he said, I will pay you \$600 in thirty days on the note (this note), I will pay you the rest as quick as I can, but you must not be too hard on me. * * * The old lady, Mrs. Henry Landis, spoke up saying, Roth, we will pay you every dollar if we have to pay it out of our pocket. Henry said, yes, we will pay you."

The learned judge charged the jury that "If it be true that this

was all said, the latter part of their expressions is sufficient in the judgment of the court to enable the jury to find a positive promise." The jury so found.

This subject has been so frequently and elaborately discussed that we may be excused from going over the ground again at length, and it is sufficient to indicate the rule as laid down by the authorities, and then apply it to the facts of this case. In *Miller v. Baschore*, 83 Penn. St. 356, it was said: "In order to effect such a result there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay." In the later case of *Palmer v. Gillespie*, 95 Penn. St. 340; s. c., 40 Am. Rep. 657, it was held that the promise to pay need not be express. It was said by Justice MERCUR: "It is not essentially necessary that the promise be actual or express, provided that the other necessary facts are shown. A clear, distinct unequivocal acknowledgment of the debt is sufficient to take a case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise, without its having been actually or expressly made. There must not be uncertainty as to the particular debt to which the admission applies."

The meaning of which is that where the debt is identified beyond all doubt, and distinctly acknowledged, the law will imply a promise to pay it; but it is not a subject for a jury to guess at.

In the case in hand the debt was not sufficiently identified. In the conversation testified to by the plaintiff there is not a word as to the date of the note, its amount, or the balance due thereon. The note itself was not produced, and there is no evidence that the plaintiff had it with him. There is no certainty as to what debt or what note was referred to; any uncertainty either in the acknowledgment or identification of the debt is fatal. *Burr v. Burr*, 2 Casey, 284. In that case there was one actual payment on account, but this court held the debt was not identified. The evidence there was as follows: "Mother says, can thee let me have a little interest money on that note which I hold of thine?" He said, "how much would thee like, mother?" She said, "four or five dollars, and he gave her seven." There was no evidence of the existence of any other note between the parties, yet it was held that the acknowledgment was insufficient. The present case is certainly

Landis v. Roth.

no stronger, and as *Burr v. Burr* has been constantly followed to the present time, we are constrained to reverse this judgment.

Judgment reversed and a *venire facias de novo* awarded.

NOTE BY THE REPORTER.—As to acknowledgment and promise to a stranger. *Stewart v. Garrett*, 65 Md. 392; s. c., 57 Am. Rep. 333; *De Freest v. Warner*, 98 N. Y. 217; s. c., 50 Am. Rep. 657; *Backman v. Roller*, 9 Baxt. 409; s. c., 40 Am. Rep. 97; *Sibert v. Wilder*, 16 Kans. 136; s. c., 22 Am. Rep. 230; *Kirby v. Mills*, 78 N. C. 124; s. c., 24 Am. Rep. 460.

As to payment by joint debtor. *Walters v. Kraft*, 23 S. C. 578; s. c., 55 Am. Rep. 44; *Parker v. Butterworth*, 46 N. J. L. 244; s. c., 50 Am. Rep. 407; *Kallenbach v. Dickinson*, 100 Ill. 427; s. c., 39 Am. Rep. 47; *Müller v. Miller*, Mac A. & Mack. 109; s. c., 48 Am. Rep. 738; *Burgoon v. Bixler*, 55 Md. 384; 39 Am. Rep. 417; *Bush v. Stowell*, 71 Penn. St. 208; s. c., 10 Am. Rep. 694.

Promise of one joint debtor. *Campbell v. Brown*, 86 N. C. 376; s. c., 41 Am. Rep. 464; *Elder v. Dyer*, 26 Kans. 604; s. c., 40 Am. Rep. 320.

Memorandum among papers of debtor. *Abercrombie v. Butts*, 72 Ga. 74; s. c., 53 Am. Rep. 832; *Allen v. Collins*, 70 Mo. 138; s. c., 35 Am. Rep. 316.

As to payment by assignee. *Whitney v. Chambers*, 17 Neb. 70; s. c., 52 Am. Rep. 398.

Conditional promise. *Parker v. Butterworth*, 46 N. J. L. 244; s. c., 50 Am. Rep. 407; *Richardson v. Bricker*, 70 Colo. 58; s. c., 49 Am. Rep. 344; *Pierce v. Seymour*, 52 Wis. 272; s. c., 38 Am. Rep. 737; *Morton v. Shepard*, 48 Conn. 141; s. c., 40 Am. Rep. 157; *Abrahams v. Swann*, 18 W. Va. 274; s. c., 41 Am. Rep. 692; *Chambers v. Rubey*, 48 Mo. 99; s. c., 4 Am. Rep. 318.

Acknowledgment sufficient without promise. *Pulmer v. Gillespie*, 95 Penn. St. 340; s. c., 40 Am. Rep. 657.

Must be unconditional and in writing. *Pierce v. Seymour*, 52 Wis. 272; s. c., 38 Am. Rep. 737.

Promise or payment by partner after dissolution. *Tale v. Clements*, 16 Fla. 339; s. c., 26 Am. Rep. 709; *Mayberry v. Willoughby*, 5 Neb. 368; s. c., 25 Am. Rep. 491; *Mix v. Shattuck*, 50 Vt. 421; s. c., 28 Am. Rep. 511; *Beardsley v. Hall*, 36 Conn. 270; s. c., 4 Am. Rep. 74; *Merritt v. Day*, 38 N. J. L. 32 s. c., 20 Am. Rep. 362.

Payment by creditor out of collateral. *Sornberger v. Lee*, 14 Neb. 193; 45 Am. Rep. 106; *Brown v. Latham*, 58 N. H. 30; s. c., 42 Am. Rep. 568.

Payment by principal — effect on surety. *Green v. Greensboro Female College*, 83 N. C. 449; s. c., 35 Am. Rep. 579; *Knight v. Clements*, 45 Ala. 89; s. c., 6 Am. Rep. 693; *Schindel v. Gates*, 46 Md. 604; s. c., 24 Am. Rep. 526.

Payment by surety out of principal's funds. *McConnell v. Merrill*, 53 Vt. 149; s. c., 38 Am. Rep. 663.

Payment by co-surety. *Cocke v. Hoffman*, 5 Lea, 105; s. c., 40 Am. Rep. 23.

Payment by administrator or executor. *County of Vernon v. Stewart*, 64 Mo. 408; s. c., 27 Am. Rep. 250; *Shreve v. Joyce*, 36 N. J. L. 44; s. c., 13 Am. Rep. 417; *Seig v. Acord's Err.*, 21 Gratt. 365; s. c., 8 Am. Rep. 605.

The doctrine of the principal case seems peculiar to Pennsylvania, Missis

Landis v. Roth.

issippi, South Carolina, and possibly Maine. It was laid down in *Miller v. Baschore*, 83 Penn. St. 356; s. c., 24 Am. Rep. 187.

In *Abrahams v. Swann*, 18 W. Va. 274; s. c., 41 Am. Rep. 692, it was held that parol evidence was competent to identify the debt.

In *Morrell v. Ferrier*, 7 Colo. 21, the court said: "Moreover it is laid down as a general rule, that where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is upon the defendant to show that it related to another debt, either wholly or in part. Wood Limitation of Actions, 162; Angell Limitation of Actions, § 238; 2 Greenl. Ev., § 441; *Carr's Adm'r v. Hurlbut's Adm'r*, 41 Mo. 264; *Whitney v. Bigelow*, 4 Pick. 119; *Cook v. Martin*, 29 Conn. 63. If this rule be a sound one in general application, it certainly would apply with peculiar force in a case where but one item of indebtedness is in suit, and where one matter of indebtedness only is referred to in the acknowledgment or new promise."

In *Trustees v. Gilman*, 53 Miss. 148, the debtor wrote: "It would suit my convenience to execute my note for the balance due for rent." Held, too vague and indefinite. "It does not identify the debt. It mentions a balance due for rent, but does not state when, nor from what, nor to whom the rent accrued, nor what the balance was. To allow all these things to be proved by parol would produce the evil the statute 'was intended to prevent.'" This was followed in *Eichford v. Evans*, 58 Miss. 18, where the writing was: "I wrote to Mr. McKnight about the first of this month, to know how I should send the money, and have not heard from him. I am going to Aberdeen to-morrow, and will send \$50, which is all I can possibly spare at present." The court said: "The writing must identify the debt to which it relates, with such definiteness as to the amount due, and the creditor, that nothing important is left open to further testimony."

In *Robbins v. Farley*, 2 Strob. 318, it was held that the acknowledgment "must specify or plainly refer to some particular demand or cause of action." So a statement that "the plaintiff was to receive compensation for his services," and that "she had never paid him any thing," was held insufficient.

In *Pray v. Garcelon*, 17 Me. 145, an admission "that he was owing the plaintiff something, and it ought to be settled," was held insufficient. "When it does not refer to any particular claim, and none is at that time produced, no promise can be implied to settle or pay any particular demand."

In *Bell v. Morriaon*, 1 Pet. 365, it was held that "the admission of the existence of an unliquidated account on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the parties understood the balance to be, would not establish any particular subsisting debt," and would be insufficient.

Wood says (Limitation of Actions, 154): "It is not essential that the amount of the debt should be stated or even referred to. It is sufficient if the acknowledgment admits sufficient to be due upon a specific claim, and parol evidence is admissible to prove the amount; and the same is also true as to the nature of the indebtedness. But it must be shown unmistakably to relate to the particular debt or demand, which is sought to be revived by it, or the

Landis v. Roth.

acknowledgment must be attended by circumstances which will enable a jury to ascertain definitely what debt was intended." "The acknowledgment must appear or be shown to relate to the debt, which is the cause of action, but will be presumed to refer to that proved by the creditor, unless another is shown to exist by his evidence or that of the debtor, because if there is no other debt there is no need of proof, and if there is, the burden rests with him who maintains the affirmative." Wood Lim. Act. 156, note.

In *Abrahams v. Swann*, 18 W. Va. 274; s. c., 41 Am. Rep. 692, it was held that parol evidence was admissible to identify the debt.

"If there be words of acknowledgment or promise, without declared reference to the debt in question, it is for the jury to determine, from the circumstances in evidence, whether reference was had to the debt sought to be recovered." *Whitney v. Bigelow*, 4 Pick. 412. To the same effect, *Beal v. Neuil*, 4 B. & Ald. 571; *Frost v. Benough*, 1 Bing. 266; *Lee v. Wyse*, 35 Conn. 384; *Shaw v. Newell*, 1 R. I. 498.

In *McCahill v. Mehrbach*, 37 Hun, 504, a letter referring to a bill which the writer owed for services, and a promise to see the creditor and show him what he owed him and to pay it, held sufficient.

In *Barnard v. Bartholomew*, 22 Pick. 291, the court said: "However correct the position may be, that where there are various demands subsisting between the parties, it is incumbent on the plaintiff to show clearly to which of them the acknowledgment refers, and in case of the existence of two distinct claims, one of which was collectible by law, and the other barred by the statute of limitations, it might well be presumed, in the absence of all evidence applying it specifically, that the acknowledgment applied to the one legally collectible, rather than to that which was barred by the statute of limitations, yet in the present case this objection does not seem properly to arise, because the account of the plaintiff to which the new promise is to be applied is one continuous demand, being the book account of the plaintiff extending through a series of years, with credits to the defendant, and as to which there are no rests, nor have there been any balances struck between the parties during the period of the charges. The new promise may under the circumstances of this case be properly applied to the entire account on the books of the plaintiff."

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

NEELLY V. LANCASTER.

(47 Ark. 175.)

Marriage — tenancy by curtesy.

A statute giving married woman the exclusive ownership and control of their real estate does not abolish the right of tenancy by curtesy.

EJECTMENT. The opinion states the case.

W. N. May and Hall & Carter, for appellant.

Davis & Bullock and Jacoway & Jacoway, for appellees.

COCKRILL, C. J. The action in this case is ejectment. Mary Jane Wicker, acquired title to lands in the controversy by descent from her father in 1861. In 1881, being still seised in fee of the lands, she intermarried with John L. Lancaster, the appellee. A child, capable of inheriting the estate, was born alive of this marriage, and in 1883 the wife died without living issue, and without making or attempting to make any disposition of the land. The husband continued in possession, when the appellant, who is admitted to be the vendee or the rightful heir at law, brought this action against him. The appellee, who is the husband, in his answer set forth the facts substantially as stated. A demurrer to

Needly v. Lancaster.

the answer was overruled, the plaintiff submitted to the judgment and appealed.

The question is, has curtesy been abolished by the married woman's enabling provisions contained in the Constitution and statutes. Art 9, § 7, of the Constitution of 1874 is as follows:

"The real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her, the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband."

Section 4624, Mansfield's Digest, which is taken from the act of April 28, 1873, declares that the property of a married woman, together with the rents and profits thereof, whether acquired before or after marriage, "shall notwithstanding her marriage be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference and control of her husband or liable for his debts."

Curtesy has not been the subject of legislative enactment in this State, and the common law upon that subject prevails, except as modified or changed by the provisions above quoted. They contain no express exclusion of the husband's marital rights in the deceased wife's property, and if the incidents of marriage as recognized by common law are abrogated by them, it is because the rights which they secure to the wife are inconsistent with the husband's common-law rights. To the extent of the inconsistency between the positive provisions of the law and the rules of the common law the latter must of course yield and give place to the former. That the wife may hold her lands to her separate use, free from the interference of her husband and his creditors, is plain from the terms of the written law. In the absence of regulating statutes, or constitutional provisions, she would not enjoy these rights, for the immediate effect of coverture would be to invest the husband with the usufruct of her real estate, and upon the birth of issue capable of inheriting the estate, he would take an enlarged life interest in it, and would become what was termed a tenant by the curtesy initiate, with power to convey his estate without the wife's concurrence. That it was the purpose of the provisions quoted to abolish this feature of the tenancy by the curtesy, and thereby exclude the

rights of the husband during coverture, their terms leave no room to doubt. *Hitz v. Nat. Bank*, 111 U. S. 729-31.

The same result was easily reached before the enactments referred to, by a conveyance to the wife, or to a trustee, for her sole and separate use; and the intention of the grantor in such conveyances to modify or totally exclude the husband's marital rights, as gathered from the language employed, was the test of the interest that he acquired in the lands so held by his wife. It was always admitted that the question, in courts of equity at least, was one not of power to exclude the ordinary marital rights of the husband, but of intention. It accordingly became a settled rule that if a legal or equitable estate of inheritance was limited simply to the separate use of a married woman, no intention was manifested to exclude the husband's ultimate estate, and upon issue born alive and death of the wife, he took his curtesy out of it. The fact that the rents and profits were expressly secured to the wife's separate use and the estate in terms exempted from liability for the husband's debts, it is said, did not alter the rule. And the same was true of a like estate settled upon the wife, or in trust for her, with power to convey or to direct by will or otherwise the person to whom the land should be conveyed, if at her death the power remained unexecuted. The cases all concede that the intention of such conveyances to cut off the husband's rights after the death of the wife must in some form be expressed or clearly implied to have that effect. This was ordinarily done either by stipulating that the husband should not be tenant by the curtesy of the lands conveyed, or else by passing the property immediately upon the wife's death to her heirs or appointee. *Cushing v. Blake*, 30 N. J. Eq. 689; *Stokes v. McKibben*, 13 Penn. St. 267; *Carter v. Dale*, 3 Lea, 710; s. c., 31 Am. Rep. 660; *Tremmel v. Kleiboldt*, 75 Mo. 255; *Frazer v. Hightower*, 12 Heisk. 94; *Morgan v. Morgan*, 5 Madd. 410.

If the settlement or trust deed to the wife's separate use did not plainly exclude the husband's participation after the wife's death, the restriction was construed by the courts to extend to the period of coverture only, and as the matter of his total exclusion was a thing to be accomplished merely by the expression of the intention, the conveyance was not construed to divest the husband's rights further than the terms strictly required, and words of doubtful import were not permitted to have that effect.

The provisions of the statute law restricting the marital rights

of the husband stand upon a like footing and have been so likened and construed in most of the jurisdictions where the question has arisen, the statutory or constitutional provision being held to occupy the place of the conveyance which created the separate use.

The interest of the wife under the enabling acts is not essentially different from that which subsists in relation to her separate estate when created by settlement or deed of trust. It is declared by our law to be her sole and separate property, subject to be conveyed or devised by her, as though she were a *feme sole*, and the language of the law may have full effect as like language in a deed would have without impairing the right of the husband in the enjoyment of the estate after the death of the wife. It protects her estate during her life; it does not at her death purport to affect the law of succession. There is no reason of public policy which requires that the law should be differently construed, and the common-law incidents of marriage are swept away only by express enactment or necessary implication. *Bertles v. Nunan*, 52 N. Y. 160; s. c., 44 Am. Rep. 361; *Robinson v. Eagle*, 29 Ark. 202.

If the framers of the law intended a different construction it would have been easy to accomplish it either by expressly abolishing curtesy, or by directing a different succession on the death of the wife. But under the provisions of the law quoted, and the construction that we have heretofore placed upon it, whatever interest the husband may acquire in the lands of his wife by marriage may be swept away by her subsequent conveyance or devise of them. *Bagley v. Fletcher*, 44 Ark. 153; *Milwee v. Milwee*, 44 Ark. 112; *Roberts v. Wilcoxson*, 36 Ark. 355.

In the same manner could she defeat the possibility of curtesy in her separate estate before the statute, by conveying or causing it to be conveyed away in pursuance of a power granted to her in the instrument.

The rule therefore under our law is, and it is the established doctrine under similar laws, with few exceptions, that while the husband is excluded during the wife's life from the control of or interference with her separate real estate, yet the right of curtesy is left to him in so much of it as remains undisposed of at her death. *Kelly Cont. Mar. Women*, 94-95; 1 *Bish. Mar. Women*, §§ 147, 150; *Schouler Husb. and Wife*, § 423; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Porch v. Fries*, 18 N. J. Eq. 204; *Prall v. Smith*, 31 N. J. L. 244; *Hatfield v. Sneden*, 54 N. Y. 280; *Bertles v. Nunan*, 92 N. Y.

Western Union Telegraph Company v. Cobb.

160; s. c., 44 Am. Rep. 361; *Martin v. Robson*, 65 Ill. 129; s. c., 16 Am. Rep. 528; *Cole v. Van Riper*, 44 Ill. 58; *Leggett v. McClelland*, 39 Ohio St. 624; *Hauck v. Ritter*, 76 Penn. St. 280; *Stewart v. Ross*, 50 Miss. 776; *Houston v. Gaseell*, 7 Jones, 161.

In the case at bar, upon the death of the wife, the estate vested in her heir subject to the intervening particular estate of the appellee as tenant by the curtesy. He therefore holds an estate in the lands for his life, and the plaintiff is not entitled to the possession.

Let the judgment be affirmed.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY V. COBB.

(47 Ark. 344.)

Telegraphs—limitation of liability—statutory penalty.

A condition on a telegraph blank that the company shall not be liable for any claim of damages unless presented within sixty days, does not relieve from a statutory penalty for negligent delay in transmitting or delivering messages.

ACTION for statutory penalty. The opinion states the case. The plaintiff had judgment below.

U. M. & G. B. Rose, for appellant.

George H. Sanders and *Joseph W. Martin*, for appellee.

SMITH, J. This action was to recover the statutory penalty of \$100 for negligent delay in the delivery of a telegram. The defense was that the plaintiff had not exhibited his demand within sixty days from the time he sent the message. There was a jury trial and the plaintiff had a verdict and judgment.

The message was received for transmission, subject to the following condition, which was printed on the blank form furnished by the company:

“The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.”

And it was admitted that the plaintiff had made no claim before bringing his action which was six months after the message was sent.

Western Union Telegraph Company v. Cobb.

The rejection of the following prayer is the only error assigned here: "If you find that the plaintiff's message was written upon a telegraph blank upon which was printed a condition exempting the company from liability unless a demand in writing was presented within sixty days after the sending of the message, and if you find that no demand in writing was presented by the plaintiff within that time, you will find for the defendant."

In *W. U. Tel. Co. v. Jones*, 95 Ind. 228; s. c., 48 Am. Rep. 713, this point was ruled in favor of the telegraph company. It was said that "claims" is a word of very extensive signification, embracing every species of legal demand; that the word "damages" means that which is assessed in the plaintiff's favor as the amount of his recovery; and that the penalty given by the statute is in this sense damages, it being recoverable not by public prosecution, but by a civil action in the name of the sender of the message, in which the public has no interest.

But with due deference to that learned court, we were unable to assent to its conclusion or its train of reasoning. The notice for which the company stipulated was a claim for damages. By damages we understand the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory they are precisely commensurate with the injury received, except in the case of exemplary damages, or smart money, where some element of fraud, malice, gross negligence, or oppression, enter into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery. Field Dam., § 2; 2 Greenl. Ev., § 223; Bouvier Law Dict., *sub nom* Penalty.

As the object of the statute is not to recompense the plaintiff for the actual damage he has suffered, but to quicken the diligence of telegraph companies in the transmission of dispatches, it follows that this cannot be considered an action for damages. The plaintiff does not seek reparation proportioned to the loss or inconvenience to which he has been subjected; but to recover a penalty, the amount of which is fixed by statute, regardless of the fact whether his loss be great or small. He neither alleges, nor proves, actual damages; nor was it necessary to do so. *L. R. & Ft. S. Tel. Co. v. Davis*, 41 Ark. 79; *W. U. Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 774; *W. U. Tel. Co. v. Adams*, 87 Ind. 598; s. c.,

44 Am. Rep. 776; *W. U. Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692.

Nor can the statutory penalty be considered as in the nature of liquidated damages. This phrase is confined to cases where the extent of the damages has been determined by anticipatory agreement between the parties.

The only claim, to notice of which the company was entitled under the clause in question, was a cause of action sounding in damages—not debt for a penalty. The plaintiff had no such claim to present. As the message related to a family matter, it is probable the failure to deliver promptly caused no pecuniary detriment. The necessity for speedy information may exist equally in both cases, viz., to enable the company to ascertain the true cause of the miscarriage, before time has obliterated the facts from human memory. But the language of the stipulation does not cover both cases; and it will not be presumed the parties intended something they have not expressed.

Judgment affirmed.

COLLIER V. DAVIS.

(47 Ark. 387.)

Assignment for creditors — void conditions.

An assignment for creditors is void for providing that no creditor shall participate unless he accepts his share in full satisfaction,* and for not designating a time within which they are to come in, and for providing that the trust shall be administered and closed under the supervision of the assenting creditors.

REPLEVIN. The opinion states the case. The defendant had judgment below.

Jacoway & Jacoway, for appellant.

Hall & Carter, for appellee.

SMITH, J. McGuire, in 1884, made an assignment for the bene-

* See *Gredy v. Dixon*, ante, 673.

fit of his creditors. The deed, after reciting that the maker is indebted in a sum far beyond his ability to pay, conveys to the trustee certain goods, wares and merchandise, which are particularly described in an accompanying schedule, and all the debtor's choses in action. The trustee is empowered to sell the goods, on the best terms he can, consistently with the statute, to collect the debts, and apply the proceeds ratably among the creditors. But no creditor is to participate in the distribution of the assets, unless he will accept his share in full satisfaction of his claim. And the assignment is to be settled and closed up under the directions of the creditors who assent to the same.

The assignee filed his inventory and bond in the proper court, took possession, and notified creditors of the date, terms and conditions of the assignment, as well as of assets and liabilities. A majority in number and value of creditors promptly expressed their acquiescence in the arrangement; but four creditors sued out attachments. Under these writs the sheriff seized the goods. The assignee brought replevin, and on a trial before the court without a jury, the assignment was declared void and the defendant had judgment.

The only evidence introduced, besides the deed and schedule, was an agreed statement of facts. From this it appeared that McGuire was insolvent, at the time of the assignment, and in such confirmed ill health that he had despaired of his life. The assignment included all of his property which was subject to execution. The claims of assenting creditors aggregated \$800.87, while those of attaching creditors were \$779.19. The assignee had, by consent of all parties in interest, sold the goods, and the net proceeds in his hands, after deducting all expenses, were \$612.18; for which sum, it was agreed, judgment might be rendered against him and his sureties in the replevin bond, if the court should find that the defendant was entitled to a return of the goods.

As the deed is in all substantial respects, a copy of the one which is set out in *Clayton v. Johnson*, 36 Ark. 406; s. c., 38 Am. Rep. 40, we are under the necessity of re-examining the grounds of that decision. It is always a misfortune for a court to change front on a question which may affect property rights acquired since the rule was announced. And it is sometimes doubtful whether more mischief will be produced by adhering to an error, or by retracting it. The case has stood for more than five years, although it was never

satisfactory to the profession. It is however indefensible in principle, and it was decided against the clear weight of authority.

In that case the single objection that was raised below, or considered here, was to the provision that no creditor should participate in the assets unless he would accept his share in full satisfaction of his claim. No directions were given for the disposition of any surplus after satisfying the creditors who acceded to these terms. And it was held this did not vitiate the assignment.

It seems to be admitted, in the reasoning of the court, that if the debtors had expressly reserved to themselves the surplus this would have been fraudulent. It is said: "There being no statute in this State prohibiting it, there is nothing in the general statute against fraudulent conveyances which can be construed to prevent a debtor from assigning all of his property, without reservation or benefit to himself, to a trustee for the payment of his debts, with a stipulation for a release."

Now, if no disposition of the surplus is made, a trust results to the maker by implication of law. And so far as the validity of the instrument is concerned, we can perceive no solid distinction between an express and an implied reservation. In one case, as much as the other, the assignment hinders and delays creditors in their remedies and endangers the ultimate collection of their debts. It puts the property beyond the reach of judgments and executions, into the hands of an assignee, chosen not by themselves, but by the debtor. It is locked up until the trusts of the deed are satisfied, and whatever remains is returned to the debtor in money — a form which is ordinarily intangible and inaccessible. Accordingly, those courts which condemn express reservations of the surplus have uniformly, so far as our researches extend, held that implied reservations are equally as bad. *Dana v. Lull*, 17 Vt. 390, *Malcolm v. Hodges*, 8 Md. 418; *Bridges v. Hinds*, 16 Md. 104; *Whedbee v. Stewart*, 40 Md. 414; *Atkinson v. Jordan*, 5 Ohio, 178; s. c., 24 Am. Dec. 281; *Henderson v. Bliss*, 8 Ind. 100.

In New York, and perhaps in every other jurisdiction where the question has arisen, except those mentioned in *Clayton v. Johnson*, the invalidity of assignments, stipulating for a release as a condition of receiving any benefit under the assignment, has been established. And it is a remarkable fact that in an opinion prepared by the late chief justice, the drift of the decisions on this subject in several States has been totally misapprehended. Having himself a high

Coffier v. Davis.

reneration for precedents, no judge was ever more diligent in searching for them, or more careful in weighing them, or more accurate in stating the result of them.

The Alabama cases do not sustain the position assumed by the court. Take for instance, *West v. Snodgrass*, 17 Ala. 549. The head-note, which correctly summarizes the principle decided, is as follows: "A deed of assignment, by an insolvent debtor, which provides that the preferred creditors are not to enjoy its benefits unless they accept of its provisions in full satisfaction of their debts, and that if any of them refuse to accept they shall be excluded, and the *pro rata* share to which they would have been entitled, had they accepted, shall be paid to another specified creditor, and which makes no provision as to the disposition of any surplus that may remain in the event all the preferred creditors shall refuse to accept, after paying the debt of the residuary creditor, is fraudulent and void on its face."

Compare also *Grimshaw v. Walker*, 12 Ala. 101, and *Reavis v. Garner*, 12 Ala. 664, which are not mentioned in the opinion.

The case of *McCull v. Hinkley*, 4 Gill, 128, and *Kettlewell v. Stewart*, 8 Gill, 502, were virtually, though not expressly, overruled in *Green v. Trieber*, 3 Md. 11, and *Langston v. Gaither*, 3 Md. 40. In the later case of *Malcolm v. Hodges*, 8 Md. 418, the syllabus is as follows: "An implied reservation of the surplus, after paying the releasing or preferred creditors, to the grantor, avoids the deed equally with an express reservation, and the court cannot look outside of the deed to ascertain whether there will be a surplus or not." See also *Bridges v. Hindes*, 16 Md. 101; *Whedbee v. Stewart*, 40 Md. 414.

The case of *Hall v. Denison*, 17 Vt. 310, countenances stipulations for a release, as a condition of preference, but not as a condition of participation in the debtor's assets. The assignment did not attempt to exclude from all benefit under it such creditors as would not release their debts, but on the contrary, provided for the division of all property, remaining after paying preferred creditors, *pro rata* among all the creditors.

In *Dana v. Lull*, 17 Vt. 390, the head-note is as follows: "When a debtor makes a voluntary assignment of all his property to a trustee for the benefit of certain of his creditors, who are specified, and does not provide that the surplus shall be distributed among all his creditors, but there is either an express reservation

of the surplus to himself, or no direction given as to the surplus, the effect of which would be, by implication of law, a resulting trust, as to the surplus, to himself, such assignment is fraudulent *per se* and void. And this is so, notwithstanding it appears in the end that the property assigned was not sufficient to pay all the debts due to the creditors named in the assignment." * * *

The great names of Marshall and Story are appealed to, in *Clayton v. Johnson*, as favoring the view adopted by the court. But an examination of their opinions, in *Brashear v. West*, 7 Pet. 608, and in *Halsey v. Whitney*, 4 Mason, 206, shows that they reluctantly, and against the convictions of their better judgment, followed the local law of Pennsylvania and of Massachusetts.

The case of *Clayton v. Johnson*, *supra*, is on this point overruled.

We are further of the opinion that the deed under consideration is void, because it specifies no time within which creditors are to accept the provision made for them and surrender their debts. The assignee can never know when he is to begin to make distribution. He cannot tell what any creditor's share will be, until he knows what creditors are coming in. And as the time for signifying their election is unlimited, distribution may be indefinitely delayed. 2 Kent Com. *531; Burrill Assignments (4th ed.), 275; Bump. Fraud. Conv. (3 ed.) 440; *Pearpoint v. Graham*, 4 Wash. 232; *Henderson v. Bliss*, 8 Ind. 100; *Mayer v. Shields*, 59 Miss. 107.

Another fatal defect is that the deed provides the trust shall be administered and closed up under the supervision of the creditors who assent to it. The effect of this clause is to give a bare majority of assenting creditors complete control and power to keep the estate open as long as they choose. Creditors who are injured by the delay would have no redress, because the assignee is executing his trust according to its terms. The statute prescribes the duties of the assignee; and an assignment is fraudulent which vests in him any discretionary powers, or which directs or authorizes him to dispose of the property assigned, or to settle up the estate in a manner different from that pointed out in the statute. *Jaffray v. McGeehee*, 107 U. S. 361; *Raleigh v. Griffith*, 37 Ark. 150; *Leah v. Roth*, 39 Ark. 66; *Schoolfield v. Johnson*, 11 Fed. Rep. 297.

Judgment affirmed.

Martin v. Hodge.

MARTIN V. HODGE.

(47 Ark. 373.)

Contract — illegal — lottery.

The owner of property, who disposes of it by lottery, may recover it from the drawer.

REPLEVIN. The opinion states the case. The defendant had judgment below.

J. M. Hill, for appellant.

O. W. Walkins, for appellee.

BATTLE, J. This is an action of replevin to recover the possession of two horses. There is no controversy about the facts in the case. As proven on the trial, they are, substantially as follows:

On the 25th day of December, 1884, the appellant, George W. Martin was the owner of two horses. He determined to dispose of them by lottery, and for that purpose sold two hundred and fifty tickets at \$1 each, James Hodge, the appellee, being one of the purchasers. Afterward, on the night of the 25th of December, 1884, the lottery took place in Eureka Springs of this State. Three men were selected to manage and conduct the drawing. Two hundred and forty-nine white, and one black marbles were placed in a revolving keg. A boy was blind-folded; the judges turned the keg, and the boy drew a marble from the keg. Each marble was numbered in the order drawn. The owner or holder of the ticket bearing the number of the black marble was to be the owner of the horses. As each marble was drawn the judges would turn the keg, and then the boy would draw another marble. The judges continued to turn the keg and the boy to draw one marble at a time until the seventieth drawing when the black marble was drawn, and some one exclaimed, "lucky Jim Hodge." Hodge, then, quickly went out of the house where the drawing took place, and without exhibiting his tickets, took possession of the horses, which Martin had hitched near by, and he and one Bollinger rapidly rode them away and put them in Hodge's stable, no one expressly objecting to their doing so. It was soon discovered that Hodge was not the

Martin v. Hodge.

owner or holder of ticket No. 70, but that one Turk Moore was. Hodge admitted he was not, and does not now claim that he ever was, or is. Soon after that discovery, and on the night of the drawing, Martin demanded of Hodge the possession of the horses and he refused to give them up. On the same night Martin commenced an action of replevin against Hodge, before a justice of the peace, for the possession of the horses, and about midnight the constable, who executed the order of delivery, took possession of them. "But the next day he went to the office of Hodge's attorney, in whose office was also the office of the justice of the peace before whom the cause was pending, and said he did not want to have any thing more to do with the affair, and dismissed the suit and told the constable, then present, that he would let Hodge and Moore fight it out, and to return the horses to Hodge," which the constable did. Afterward, on the same day, upon reconsideration, he changed his mind, and brought this action for the same horses.

Among the instructions given, the court instructed the jury as follows: "If plaintiff had parted with possession of the property in controversy to defendant, at or before the beginning of this suit, and intended so to part with it, either by delivering to Hodge or authorizing the delivery thereof, you will find for defendant. As to whether plaintiff parted with his property or the possession thereof, you are to determine from all the testimony."

"If you find from the evidence that the plaintiff has lost all right of title and possession to the horses in controversy, and is only attempting to recover the possession of the same for the purpose of furthering a violation of the law, such as a lottery is, then he cannot recover and your verdict must be for defendant."

And refused to instruct the jury, at the request of plaintiff, as follows:

"That the dismissal of the former suit did not prejudice plaintiff's right to a subsequent suit for the same subject matter; and that the dismissal of the former suit did not confer any right upon defendant."

"That a lottery consists in the distribution of prizes by chance; and neither the title nor right of possession to property can be acquired thereby."

A verdict was returned and a judgment was rendered in favor of defendant. Plaintiff moved for a new trial, which was denied, and he filed a bill of exceptions and appealed.

Martin v. Dodge.

It is a well settled doctrine that "every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." *Bartlett v. Vinor*, Carthew, 252; *Tucker v. West*, 29 Ark. 386.

It is equally well settled that "no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act. If from the plaintiff's own showing, or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of the positive laws of the country, then the courts say he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend aid to such a plaintiff." *Hollman v. Johnson*, 1 Cow. 341; *Nellis v. Clark*, 4 Hill, 424; *Merienthal v. Shafer*, 6 Iowa, 226; *Smith v. Bean*, 15 N. H. 577.

The test to determine whether a plaintiff is entitled to recover in action like this or not, is his ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery. *Eberman v. Reitzel*, 11 Watts & S. 181; *Phalen v. Clark*, 19 Conn. 421; s. c., 50 Am. Dec. 253; *Armstrong v. Toler*, 11 Wheat. 258.

The case of *Catts v. Phalen*, 2 How. 376, is illustrative of this rule. In that case, the defendant, Catts, was employed by the plaintiffs, Phalen and Morris, to draw out of a lottery wheel the tickets of numbers therein to be deposited by plaintiffs, without selection and by chance, it being understood that the tickets of numbers, when drawn out in a certain order, were to determine the prizes to such lottery tickets as the plaintiffs had disposed of, or still held in their own hands according as the tickets of numbers so drawn out corresponded with the numbers on the face of such lottery tickets respectively. Catts, after his employment, employed one Hill to purchase a ticket in this lottery for him, but apparently for Hill himself. Hill purchased the ticket in the manner he was employed, and delivered it to Catts. Catts, being in possession of the ticket purchased for him, on the day of the drawings, pretended to draw out of the wheel the

tickets of numbers therein deposited by plaintiffs, while at the same time he had fraudulently concealed in the cuff of his coat false and fictitious tickets of numbers fraudulently prepared by him, which exactly corresponded in numbers with the numbers on the face of the ticket held by him. In drawing out the tickets of numbers, he contrived to slip between his finger and thumb the false and fictitious tickets of numbers concealed in his cuff, and produced and exhibited the same to plaintiff's agent as and for genuine tickets properly drawn from the wheel, and by reason thereof the ticket purchased for him, Catts, was registered as the ticket entitled to a prize of \$15,000. He then hired Hill to claim the ticket and collect for him the \$15,000, less fifteen per cent to be deducted by plaintiffs, which Hill did. Phalen and Morris, discovering the fraud after the prize had been paid, brought suit to recover it. The court, assuming that the lottery was illegal, said: "The facts of the case present a scene of deeply concocted, deliberate, gross and most wicked fraud, which the defendant neither attempted to disprove or mitigate at the trial, the consequence of which is that he has not, and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn.

"So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and in point of law he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs by means of any other false pretense, and he is estopped from avowing that the lottery was in fact drawn.

"Such being the legal position of Catts, the case before us is simply this: Phalen and Morris had in their possession \$12,500, either in their own right, or as trustees for others interested in the lottery. No matter which, the legal right to this sum was in them; the defendant claimed and received it by false and fraudulent pretenses, as morally criminal as by larceny, forgery or perjury, and the question before us is, whether he can retain it by any principle or rule of law.

"The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to, or drew the prize; it was paid and received on the false assertion of that fact. The contract which the law raises between them is not founded on the drawing of the lottery,

Martin v. Hodge.

but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place."

According to these principles of law and this test of their application, is plaintiff in this action entitled to recover?

By the statutes of this State it is enacted: "Any person who shall vend or otherwise dispose of any lottery tickets, gift concert ticket, or like device, shall be deemed guilty of a misdemeanor and liable to indictment, and on conviction thereof, shall be fined in a sum not less than \$50 nor more than \$500. Mansf. Dig., § 1915.

Martin's possession of the horses in controversy at the time they were taken by Hodge is *prima facie* evidence of title. Any wrongful taking is not sufficient to shift upon him the burden of proving his title to the property and right to possession. If the possession of Martin and a wrongful taking from him were proven, and nothing more, he would be entitled to recover.

The evidence shows appellant proposed to dispose of his horses by lottery; and for that purpose sold two hundred and fifty tickets for sums amounting in the aggregate to \$250, the full value of his horses. He thereafter undertook to hold the horses in trust for the ticket-holder who should hold the ticket which would be entitled to, or draw the prize, when the drawing of the lottery took place. This undertaking was illegal and void. It and the sale of the tickets did not affect plaintiff's title to or right to the possession of the horses. At the time of the drawing they were still in his possession. It was understood that he would deliver them to the holder of the ticket of the number corresponding to the number of the drawing of the black marble. Hodge did not hold that ticket; no one authorized to do so decided he did. There was therefore no implied permission given to him to take the horses when he did; circumstances implied the reverse. There is no evidence that he had express permission. Any one else who did not have a ticket in Martin's lottery and never had one in any other lottery, might have taken possession of the horses at the time of the drawing as Hodge did, and succeeding in riding them away without objection, hold them under a claim and right equally as good as that on which Hodge relies. Hodge stands in no better attitude than he would have stood if he had held no ticket. His taking was wrongful. It was not necessary for Martin to introduce any evidence in respect to the lottery to establish his

right to the horses. His right to recover is not dependent on that transaction.

Martin's right to recover does not depend on any disposition he may make of the horses in controversy. He can give them away. If the consideration of the gift is not deemed good in law, the gift will be only void as against creditors and purchasers. Hodge, so far as any thing appears in evidence, would not have a right to complain in any kind of an action. He certainly has not in this. Mansf. Dig., § 3376.

The dismissal of the first action of replevin should not prejudice plaintiff's right to the horses. He was compelled to restore them to the possession of Hodge. He could not dismiss on any other condition. The dismissal placed the parties in *statu quo*. The statute expressly provides that such dismissals may be without prejudice to a future action. The evidence shows he did not concede Hodge's right to hold the horses as a price or otherwise by the dismissal. Mansf. Dig., §§ 5102, 5103.

In giving the instructions above set forth, in so far as they are inconsistent with this opinion, and in not giving those asked for and refused as before stated the court erred. The motion for new trial should have been granted.

The judgment of the court below is reversed, and this cause is remanded with an instruction to the court to grant appellant a new trial.

Judgment reversed.

SCALES V. STATE.

(47 Ark. 478.)

Criminal law — Sabbath-breaking — constitutionality.

An indictment lies against one for laboring on Sunday, although he belongs to a sect who observe another day as the Sabbath, and conforms to their practice. (See note, p. 772.)

CONVICTION of Sabbath-breaking. The opinion states the case.

J. D. Walker, for appellant.

Daniel W. Jones, attorney-general, for appellee.

Scales v. State.

COCKRILL, C. J. This is an appeal from a conviction for "Sabbath-breaking." The sufficiency of the indictment was questioned by a motion in arrest of judgment. The particular act that constitutes the alleged offense is not set out. The indictment charges merely that the defendant "on the 3d day of May, 1885, the said day being Sunday, unlawfully was found laboring and performing other services, the same not then and there being of customary household duty of daily necessity, comfort or charity.

[Omitting question of form.]

The statute under which this conviction was had comes to us from the Revised Statutes of 1838. It contained this provision, which was carried forward into the revision of 1884 as section 1886, viz.: "Persons who are members of any religious society who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday, shall not be subject to the penalty of this act, so that they observe one day in the seven agreeably to the faith and practice of their church or society." But in 1885, before the commission of the offense charged in the indictment, the legislature passed an act the only part of which that is material to this prosecution is as follows: "That section 1886 of Revised Statutes of Arkansas be and the same is hereby repealed." Acts of 1885, p. 37.

The proof showed that the appellant was found painting a church on a Sunday. He offered to prove that he was a member of a religious society known as the Seventh Day Baptists, one of the tenets of which is the observance of Saturday as the Sabbath instead of Sunday, and that he had regularly refrained from all secular work and labor on Saturday agreeably to his religious faith and that of his church.

It is argued that the court erred in rejecting this testimony because it is said, first, the effort to repeal section 1886 was ineffectual; and second, that if it was not, the law without the exception made by that section, gives a preference to the other religious denominations over that of the appellant, within the meaning of section 24 of article 2 of the State Constitution, which provides that "No preference shall ever be given by law to any religious establishment, denomination or mode of worship above any other," and moreover denies to him the equal protection of the law, within the meaning of the Federal Constitution.

[Omitting first ground.]

The constitutionality of this law as originally enacted has been

repeatedly affirmed by this court in both civil and criminal cases. *Shover v. State*, 10 Ark. 259; *State v. Anderson*, 30 Ark. 131; *Tucker v. West*, 29 Ark. 386; *Merritt v. Robinson*, 35 Ark. 483.

No reference was ever made to the exception contained in section 1886, for the purpose of maintaining its validity, and we are cited to no case or authority where the view is entertained that the failure to make the exception in favor of those who faithfully observe a different day as their Sabbath will render the law invalid. The Supreme Court of California expressed that view in 1858, over the dissent of Judge STEPHEN J. FIELD (*Ex parte Newman*, 9 Cal. 502), but the dissenting opinion was afterward adopted by the court as the correct exposition of the law (*Ex parte Andrews*, 18 Cal. 678), and the validity of the statute has ever since been maintained in that State. *Ex parte Bird*, 19 Cal. 130; *Ex parte Koser*, 60 Cal. 177.

The validity of similar statutes has been affirmed elsewhere against repeated assaults, and in Louisiana it has even been held that a municipal ordinance which forbade the sale of goods on Sunday, but excepted from its operation those who kept their places of business closed on Saturday, was in the teeth of the Constitution, in that it gave to the Saturday observer a privilege denied to others. *City of Shreveport v. Levy*, 26 La. Ann. 671. But the legislative enactments of most of the States preserve to those whose religious faith impels them to keep holy a different day from Sunday, the right to keep Sunday as a secular day, if not to the full extent given under our statute before the act of 1887, at least to do so in such a manner as not to disturb those who observe that day, and the acts in either form, whether making a full and free exception of the observer of other days, or none at all, are held to be a valid exercise of legislative power.

The reasons that are commonly given for sustaining these acts are briefly stated by Judge DEVENS, in a recent Massachusetts case, in these words: "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for that purpose, and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the

. Scales v. State.

community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems suitable or appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of the community." *Commonwealth v. Has*, 123 Mass. 40. See too *Cooley Const. Lim.* * 476-7; *Desty Cr. Law*, § 117 *a*, and cases cited; *Frolickstein v. Mayor of Mobile*, 40 Ala. 725; *Gabel v. City of Houston*, 29 Tex. 335; *Swann v. Swann*, 21 Fed. Rep. 299; *Parker v. State* (Sup. Ct. Tenn. 1886), 1 S. W. Rep. 202; *Specht v. Commonwealth*, 8 Penn. St. 312; s. c., 49 Am. Dec. 518, and cases cited *supra*.

It is said that every day in the week is observed by some one of the religious sects of the world as a day of rest, and if the power is denied to fix by law Sunday as such a day, the same reason would prevent the selection of any day; but the power of the legislature to select a day as a holiday is everywhere conceded. This State, from the beginning, has appropriated Sunday as such. On that day the business of our courts and public offices has always been suspended (*Mansf. Dig.*, § 1483); the issuance and service of legal process prohibited; presentment and notice of dishonor of commercial paper not allowed (*Mansf. Dig.*, § 465), and the performance of an act in execution of a contract which matures upon Sunday, postponed to the next day. *L. R. & Ft. S. Ry. v. Dean*, 43 Ark. 520. This observance of Sunday as a day of refrainment from secular business has always been required of the people generally, without reference to creed, and they continue to so observe it without complaint, that as a municipal corporation it violates any of their constitutional or religious rights. The principle which upholds these regulations underlies the right of the State to prescribe a penalty for the violation of the Sunday law. The law which imposes the penalty operates upon all alike, and interferes with no man's religious belief, for in limiting the prohibition to secular pursuits it leaves religious profession and worship free. *Ex parte Newman, supra*.

The appellant's argument then is reduced to this, that because

he conscientiously believes that he is permitted by the law of God to labor on Sunday, he may violate with impunity a statute declaring it illegal to do so. But a man's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land. *Reynolds v. U. S.*, 98 U. S. 145.

If the law operates harshly, as laws sometimes do, the remedy is in the hands of the legislature. It is not the province of the judiciary to pass upon the wisdom and policy of legislation—that is for the members of the legislative department, and the only appeal from their determination is to their constituency.

Judgment affirmed.

NOTE BY THE REPORTER.—The following is an abstract of *State v. Judge, etc.*, Louisiana Supreme Court, February 7, 1887: A statute whose object is to require the closing of all places of business, with exceptions of certain designated classes, from 12 o'clock on Saturday night until 12 o'clock on Sunday night of each week, and to punish violations thereof by criminal penalties, is valid. (1) We take occasion promptly to say that if the object of this law were to compel the observance of Sunday as a religious institution, because it is a Christian Sabbath, to be kept holy under the ordinances of the Christian religion, we should not hesitate to declare it to be violative of the above constitutional prohibition. It would violate equally the religious liberty of the Christian, the Jew, and the infidel, none of whom can be compelled by law to comply with any merely religious observance, whether it accords with his faith and conscience or not. With rare exceptions, the American authorities concur in this view. The law in question makes no reference to Sunday as a legal holiday, and indeed the exceptions expressly made to the general prohibition conclusively show that the statute is not designed to enforce the Christian idea of the Sabbath, or to apply the rules of any religious sect to its observance. The statute is to be judged precisely as if it had selected for the day of rest any day of the week other than Sunday, and its validity is not to be questioned, because in the exercise of a wise discretion it has chosen that day which a majority of the inhabitants of this State, under the sanction of their religious faith, already voluntarily observe as a day of rest. For these reasons we consider that the constitutional provision now under consideration has no application. (2) It is claimed that the law conflicts with that clause of the fourteenth amendment to the Constitution of the United States which forbids any State "to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." No one who has read the decision of the Supreme Court of the United States in the celebrated *Slaughter House Cases* can for a moment doubt that the clause is entirely without application. Fortunately for the preservation of State autonomy and the inestimable right of local self-government, that high tribunal has wisely distinguished the "privileges and immunities" of citizens of the United States from those which appertain to citizens of the State. To the latter class belong, as it holds, all those fundamen-

Scales v. State.

tal civil rights for the security and establishment of which organized society is instituted, and these remain, with certain exceptions expressly established by the Federal Constitution, subject to the exclusive control and authority of the States free from all Federal restraint. On the other hand, the "privileges and immunities of citizens of the United States" are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, and the laws and treaties made in pursuance thereof; and these alone are placed under Federal protection by the clause quoted. It declares that a different construction "would transfer the security and protection of all the civil rights from the State to the Federal government," would "authorize Congress" to pass laws in advance, limiting and restricting the legislative power by the States in their most ordinary and usual functions, and would constitute the Supreme Court of the United States "a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights." Wherefore the court said: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." *Slaughter House Cases*, 16 Wall. 36. It is needless to say that the privileges and immunities involved under this statute belong to that class which the court characterizes as those of citizens of the State, and therefore are not referred to by this clause of the fourteenth amendment. (3) The other constitutional inhibitions invoked may be grouped and considered together. They are: First, the remaining clauses of the fourteenth amendment, viz.: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws;" second, the clause of article 6 of the State Constitution declaring that no person shall be "deprived of life, liberty or property without due process of law;" and thirdly, the declaration in article 1 of the State Constitution that government's "only legitimate end is to protect citizens in the enjoyment of life, liberty and property. When it assumes other functions it is usurpation and oppression." All these provisions simply express fundamental principles of American constitutional government, which are embodied or necessarily implied in the Constitution of all the States, and are everywhere recognized and enforced. It is not essential to discuss them severally, or with too great nicety; for it is universally admitted, that however broadly these principles may be expressed, there exists, *ex necessitate rei*, in every government, the power to impose certain restrictions upon the individual rights of "life, liberty and property," which it is not within the meaning and intent of such provisions to prohibit or restrain. Without such power society and government could not exist, or would subserve no useful purpose; the main object of government being to prevent individuals, in the exercise of their own rights, from transgressing the rights of others, and to impose that degree of restraint upon the conduct of each which is necessary to the conservation and promotion of the right of all. This is what is known as the police power of government, and it is founded in and properly limited by a just and reasonable application of the principle, *sic utere tuo ut alienum non laedas*. As has been said by an eminent judge, "It is much easier to perceive

and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." Definitions of it have been given by Blackstone, by Judge Cooley, by Chief Justice SHAW, of Massachusetts, by Chief Justice REDFIELD, of Vermont, and by Judge CHRISTIANCY, of Michigan, and by many other jurists and judges. *Vide* 4 Bl. Com. 162; Cooley Const. Lim. 572; *Com. v. Alger*, 7 Cush. 84; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140; s. c., 62 Am. Dec. 625; *People v. Jackson, etc., Co.*, 9 Mich. 285. There exists a remarkable *consensus* of authority that the establishment of a compulsory day of rest in each week is a legitimate exercise of police power. Such laws have been passed in nearly every State of the Union, and their constitutionality has never been successfully questioned in but a single case within our knowledge, that of *Ex parte Newman*, 9 Cal. 502, and it was subsequently overruled in the same court in *Ex parte Andrews*, 18 Cal. 678. The grounds upon which such legislation has been sustained are various, but those which commend themselves to our judgment as most conformable to the principle of police power are best stated by the Supreme Court of California. "The duty of government comprehends the moral as well as the physical welfare of the State; and in this instance it is asserted on behalf of this law that the passage of it is essential to the welfare of the people, both moral and physical. It is claimed that from physical causes men require respite from intellectual and physical labor in the proportion of one day's rest in seven, and that a law which enjoins this is not only for the aggregate good of society, but for the benefit of all the members. It is said that the labor of six days, with this relaxation, is more productive in the long run than the uninterrupted labor of the week. It is said besides that this law affords indirectly protection against oppression to employees, women, apprentices and servants, and that but for the law men would keep open stores and shops because their neighbors did so, and that by competition a sort of compulsion exists to violate the laws of health." *Ex parte Andrews*, 18 Cal. 678. Mr. Tiedeman develops the same idea as follow: "Whatever the metaphysicians or theologians may tell us about free will, in the complex society of the present age the individual is a free agent to but a limited degree. He is in the main but a creature of circumstances. Those who most need the cessation from labor are unable to take the necessary rest if the demands of trade should require their uninterrupted attention to business; and if the law did not interfere, the feverish, intense desire to acquire wealth, inciting a relentless rivalry and competition, would ultimately prevent, not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation, by resting periodically from labor. Remove the prohibition of law, and this wholesome sanitary regulation would cease to be observed." Tied. Lim. Police Power, 181. We have considered the objections urged against the law, that it operates unjustly against our fellow-citizens of the Jewish faith, who, in obedience to the mandates of their religion, observe Saturday as a day of rest. This objection has been often considered and overruled. *Frolickstein v. Mayor of Mobile*, 40 Ala. 725; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 id. 180; *Com. v. Hyneman*, 101 Mass. 30; *Com. v. Iias*, 122 id. 40; *Com. v. Wolf*, 3 Serg. & R. 48; *Specht v. Com.*

Kempner v. Cohn.

8 Penn. St. 812; s. c., 49 Am. Dec. 518; *Charleston v. Benjamin*, 2 Strobb. 508; *State v. Railroad Co.*, 15 W. Va. 362; s. c., 30 Am. Rep. 808. The law leaves the Jew at entire liberty to observe his own religious Sabbath, but it is not bound to take cognizance of individual religions as a ground of redemption from the operation of the general laws. Uniformity in the day fixed is essential to the successful execution of the law, which would be rendered much more difficult if a different day of rest was assigned to various classes, besides the inconvenience to the business interests of the community which would result from the partial suspension of trade on several different days. It only remains to consider the objection urged against the law on the ground of inequality, because of the numerous exceptions contained in the act. The objection has not the slightest force. The law is not unequal in any constitutional sense. No person in the State is permitted to pursue any of the prohibited callings on Sunday. Every person is at liberty to pursue those which are excepted. The same discretion which authorizes the legislature to determine that the public health, welfare, and convenience required the adoption of the general rule equally authorized it to exempt from its operation certain specified callings, on the ground that the public welfare and convenience would be more hindered than advanced by the suspensions of such callings. It is not for us to control the law-making power in such a case, or to require it to fit its laws to a Procrustean bed of our own construction. See note, 41 Am. Rep. 579.

KEMPNER V. COHN.

(47 Ark. 519.)

Contract — by letter.

A contract by letter is complete the moment an acceptance of the offer is mailed, providing it is done with reasonable promptness and before any intimation of withdrawal is received.*

CONTRACT. The opinion states the case. The plaintiff had judgment below.

J. H. Harrod, for appellant.

Caruth and Erb, for appellee.

SMITH, J. Cohn sued Kempner for the non-payment of an alleged agreement to convey a certain lot on Main street in the city of Little Rock. He claimed damages for the loss of his bargain, for expenses incurred in investigating the title, for the loss

* See notes, 32 Am. Rep. 40; 48 Am. Rep. 519.

of interest upon the money which he had raised by the sale of interest-bearing securities in order to comply with the terms of purchase and which he had been unable immediately to reinvest to his satisfaction, and for the loss of a profitable lease of the lot which he had made on the faith of getting the lot.

The answer denied the existence of any contract between the parties for the sale of the lot. Upon a trial before a jury, the plaintiff recovered a verdict and judgment for \$611.50. The assignments in the motion for a new trial were the admission of improper evidence, the refusal of the court to give a certain charge to the jury and want of evidence to sustain the verdict.

The plaintiff lived in Little Rock, the defendant at Hot Springs. The two cities are about sixty miles apart and there is communication by mail twice a day. On the 28th of January the plaintiff wrote the defendant inquiring his terms. The answer was as follows:

“HOT SPRINGS, *January 30, 1885.*

“M. M. Cohn, Little Rock, Ark.:

“Dear Sir—Yours of the 28th received and contents noted. In reply will say, in regard to the lot, I will sell you for \$10,000, \$5,000 cash and \$5,000 give your note with ten per cent interest. If that is satisfactory, send the deed and I will send you properly acknowledged. Respectfully yours.

J. KEMPNER.”

This letter was sent in the care of A. Kempner, the defendant's uncle, and agent for the payment of taxes and collection of rents, but who had no authority to contract for the sale of the lot; so that it was not delivered to Cohn until February 2. On February 5 Cohn told A. Kempner he would take the property and requested him to inform the defendant. And in reply to the letter of January 30, he wrote himself, as follows:

“LITTLE ROCK, ARK., *February 7, 1885.*

“J. Kempner, Hot Springs, Ark.:

“Dear Sir—I hand you herewith the deed for your property, which you and your wife will please sign and have duly acknowledged. In order that I may get possession as soon as possible, I would like for you to return the deed, as well as all the deeds, memoranda, agreements, contracts, etc., that you have in connection with this property, at your earliest convenience, say by Mon

Kempner v. Cohn.

day's mail, if you can. I am having the title looked up now, which if found correct, I will comply with your terms contained in your letter of January 30, to-wit: \$5,000 in cash and my note for balance or other \$5,000. If you should prefer, I will give you Mr. A. Kempner's indorsement, the note to bear ten per cent per annum. You can send the deed to Mr. A. Kempner if you want to, or to the Merchant's National Bank, if you prefer. Though if convenient, I would rather you would come up, because it is always easier to talk than to write. By the memoranda, agreements, etc., I mean your papers relating to the walls on each side, so as to know what to claim. Hoping you will give this your early attention, I am, yours truly,

M. M. COHN."

This letter was put into one of the government letter boxes before Cohn had received any notice that the offer was withdrawn. The envelope is postmarked Little Rock, February 7, 9 P. M. It reached Kempner on the 9th of February. The defendant being informed by letter from A. Kempner that Cohn was making his arrangements to buy the property, wrote on the 7th of February, to Cohn, that he had changed his mind and now declined to sell.

Evidence was given, over objection, that Cohn, immediately after receiving the letter of January 30, had set to work to procure an abstract of the title, paying therefor \$11.50, and had employed attorneys to examine the same at a cost of \$50. Also that he had parted with valuable securities to raise the money for the cash payment, and that after Kempner's refusal to consummate the trade, he had tried unsuccessfully, for some two months, to reinvest the money, whereby he had lost \$80 or \$100 in interest. It was further proved, without objection, that Cohn, about the time he wrote accepting the offer, had made a contract with another person, for a lease of the lot. The property was variously estimated by different witnesses to be worth from \$10,000 to \$12,500.

The plaintiff requested no special directions to the jury.

The instructions given at the defendant's instance were as follows:

1. The court instructs the jury that before they will be authorized to find damages for plaintiff in any sum whatever, they must believe from a preponderance of the evidence that the contract between plaintiff and defendant for the sale of said lot was definite and complete and without condition.

2. That before the jury can say that the contract in this case was completed, they must find from the evidence that the offer made by Kempner was accepted by Cohn absolutely and without qualification, and unless the offer of Kempner was thus accepted you will find for the defendant.

3. If the jury finds from the evidence that the letter of Cohn to Kempner in regard to accepting the offer of said lot contained any qualification of Kempner's proposition whatever, or that said letter was not an absolute acceptance of said proposition, Kempner is not bound and you will find for defendant.

4. Nor would Kempner be bound by the unconditional and unqualified acceptance of his offer unless the acceptance was made within a reasonable time, and it is for the jury to say what is a reasonable time, taking into consideration the situation of the parties and their facilities for communication, and unless you find from the evidence that Kempner's offer was accepted unconditionally and within a reasonable time by Cohn, you will find for defendant, Kempner.

5. The court instructs the jury that Cohn cannot recover damages for being kept out of the interest of his money, unless he tried to secure investment and failed, even if there was an absolute contract for the sale of the land.

6. The court instructs the jury that the statements made by Cohn to A. Kempner, that he, Cohn, would take the property, cannot be considered as an acceptance of J. Kempner's proposition.

And the court denied the sixth prayer, which was: "If the jury find from the evidence that Kempner rescinded his offer to sell the lot for \$10,000, and mailed that revocation before Cohn mailed his acceptance of the offer, they will find for the defendant."

I. The most material inquiry is, whether the minds of the parties ever met, or mutually assented to the same thing. When parties are conducting a negotiation through the mail, a contract is completed the moment a letter accepting the offer is posted, provided it be done with due diligence, after receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. 2 Kent Com. 477; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlap v. Higgins*, 1 H. L. Cas. 381; *Abbott v. Shepard*, 48 N. H. 14; *Mactier v. Frith*, 6 Wend. 103; s. c., 21 Am. Dec. 262; *Stockham v. Stockham*, 32 Md. 196.

II. Whether an offer remains open is a question of fact. Of

Kempner v. Cohn.

course the proposer may limit the time for acceptance, as every man has the right to dictate the terms upon which he will sell his property. Where an answer by return mail is requested, or may be expected from the usage of trade, or nature of the business, the making of the offer is accompanied by an implied stipulation that the answer shall be immediate. But unless the time is limited, the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time. Whart. Cont., § 9; *Mactier v. Frith*, *supra*; *Dunlop v. Higgins*, *supra*; *Hollock v. Insurance Co.*, 2 Dutch. 268; *Maclay v. Harvey*, 90 Ill. 525; s. c., 32 Am. Rep. 35.

Averill v. Hedge, 12 Conn. 423, is distinguishable from the case at bar in at least two particulars. There A., on the 16th of March, wrote offering to sell iron at a certain price, and the letter reached B., at Hartford, on the evening of the 18th; on the 19th, B. wrote a letter, accepting the offer, but it was not mailed until the 20th, and there being no mail on that day the letter did not get off until the 21st. And it was held the acceptance came too late. But the parties were dealing in a commodity that then was undergoing great fluctuations in value from day to day, and A. said in his letter: "We shall not consider ourselves holden to the offer made you unless you signify your acceptance thereof by return mail."

The defendant, having caused the question of reasonable time to be submitted to the jury, under an instruction drawn by his counsel, and having met with an adverse decision, now asks us to declare, as matter of law, that Cohn's acceptance was unreasonably delayed. But we think the question was properly resolved in favor of the plaintiff. The subject of negotiation was real estate, which requires more deliberation than if it had been a transaction in cotton or other article of merchandise. It is also less subject to sudden and violent fluctuations in price. Five days was not an unreasonable time within which to come to a determination, have the title looked into, and a conveyance prepared.

Then as to the attempted retraction: An offer made by letter, which is to be answered in the same way, cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before he has accepted. An uncommunicated revocation is in law no revocation at all. Benj. Sales, § 44; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Stevenson v. McLean*, 5 Q. B. Div. 346; s. c., 29 Moak's Eng. 341; s. c., 20 Am. Law Reg. 16; *Byrne v. Van Tierhoven*, 5 O. P. Div. 344; s. c., 30 Moak's Eng. 833.

Kempner v. Cohn.

When Kempner penned his withdrawal of the offer he did not know that it had been accepted at that time. But it was not necessary that he should know of it; and the acceptance was effectual to complete the contract, notwithstanding Kempner had previously mailed a letter to Cohn announcing the retraction of the offer. The case of *McCulloch v. Eagle Ins. Co.*, 1 Pick. 283, which holds a different doctrine, has been generally rejected as authority.

[Omitting question of damages.]

If the plaintiff shall, during the present term, enter a remittitur upon the usual terms of \$100, his judgment will be affirmed, otherwise he must submit to another trial.

CASES
IN THE
SUPREME COURT
OF
OHIO.

INSURANCE COMPANY V. PYLE.

(44 Ohio St. 19.)

Insurance — warranty — breach — recovery of premiums.

An innocent breach of warranty in an application for an insurance policy in a material matter, renders the policy void from the beginning, but the premiums paid may be recovered.

ACTION on an insurance policy. The opinion states the case. The plaintiff had judgment below.

Lawrence T. Neal, for plaintiff in error.

Clark and McDougal, for defendant in error.

FOLLETT, J. In filling up the application for this policy, Nipgen was the agent of the insurance company, and was not the agent of Pyle. *Insurance Co. v. Williams*, 39 Ohio St. 584. And though the application was thus made, the policy was cancelled for its untrue statements innocently made on the part of Pyle.

The application and the policy together form the contract. The terms of the contract are plain and free from doubt and ambiguity. It is agreed in the application “ that this application shall form a part of the contract of insurance, and that if there be, in any of

the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void."

And the policy provides that "this policy is issued and accepted upon the following express conditions and agreements: 1. That the answers, statements, representations and declarations, contained in, or indorsed upon this application for this insurance — which application is hereby referred to and made part of this contract — are warranted by the insured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation or concealment, that this policy shall be absolutely null and void."

I. Did the policy ever attach, or was it ever valid?

The court finds as conclusions of fact, that "several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered;" and the "court further finds that the untruth of several of said answers was upon questions material to the risk, and that by the terms of said policy, and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy, and that by its terms the breach of said warranties was to make said policy null and void."

And the court finds as a conclusion of law, that the policy "is wholly void, and of no effect whatever, and was so from the moment it was issued."

But the plaintiff in error insists that the policy took effect and was in force until it was cancelled. To sustain such a claim would ignore the express terms of both the application and the policy, as well as the cause of the cancellation of the policy. These terms the plaintiff in error has never waived, but it has insisted upon them and acted upon the strict letter of the agreement, and has cancelled the policy.

This is not a new question in the courts. In the case of *Clark v. Manufacturer's Ins. Co.*, 2 Woodb. & M. 472, the court held: "A warranty is generally a stipulation made and described in the policy itself, and must be complied with, whether material or not." "Where a material fact is suppressed in such representations, the insurance is avoided, and the policy does not attach, whether the suppression happens by neglect or fraud." In *Friesmuth v. Agawam Mutual Fire Ins. Co.*, 10 Cush. 587, "the application contained an

untrue representation that the property was unincumbered," and the court held, "that the policy was wholly void." In *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571, the court held: "If a policy of insurance declare that the statements made in the application shall be part and parcel of the policy, such statements become warranties, and must be true, whether material or not."

"A contract of insurance, like other contracts, is avoided by an untrue statement by either party as to a matter vital to the agreement, though there be no intentional fraud in the misrepresentation." *Co-operative Life Ass'n of Miss. v. Leflore*, 53 Miss. 1.

On a similar contract the Supreme Court of the United States, in *Jeffries v. Life Ins. Co.*, 22 Wall. 47, held: "Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk." And in the opinion, Mr. Justice HUNT says: "Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company." And this is approved in the case of *Aetna Life Ins. Co. v. France*, 91 U. S. 510, and there the court also held, "that the company was not liable if the statements made by the insured were not true. The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should void the policy, removes the question of their materiality from the consideration of the court or jury."

This court, in *Union Mutual Life Ins. Co. v. McMillen*, 24 Ohio St. 67, held: "Where a life policy is made and accepted, upon the expressed condition that if the annual premium is not fully paid within the time specified, the policy 'shall be null and void, and wholly forfeited,' the failure to pay the premium avoids the policy;" and that was where the policy had attached. But in such a case, in *Union Central Life Ins. Co. v. Bernard*, 33 Ohio St. 459, the court held, where "the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy-holder, through a local agent residing in his neighborhood, good faith requires that this mode of collection should not be discontinued, and payment required at the company's office, without notice to the insured."

There are mistakes in policies that may be disregarded or corrected and the policy enforced. See *Harris v. Columbiana County Mutual Ins. Co.*, 18 Ohio, 116; s. c., 51 Am. Dec. 448, and *Insurance Co. v. Williams, supra*. But in this case the court did not err in holding the policy "is wholly void and of no effect whatever, and was so from the moment it was issued."

II. Should the premium be returned ?

The court finds as a conclusion of law that Pyle is entitled to recover of the insurance company the premium paid, with proper interest. The court thus held, not only because the policy was void *ab initio*, but because it also found "that all of said questions so erroneously answered were answered by the plaintiff under an innocent misapprehension of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant."

There was no actual fraud, at least on the part of Pyle. On this policy, no risk ever attached.

In 1777, in the case of *Tyrie v. Fletcher*, Cowp. 666, 668, Lord MANSFIELD stated the general rule to be, "that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it."

In 1800, in the case of *Delavigne v. United Ins. Co.*, 1 Johns. Cas. 310, the court held, "where a policy becomes void by a failure of the warranty, the insured is entitled to a return of the premium, if there be no actual fraud."

"Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer." *Anderson v. Thornton*, 8 Exch. 425.

And such is now the general rule. See 3 Kent Com. *341, and May on Ins., § 4.

The rule is different where the risk has attached or there is actual fraud.

Arcade Hotel Co. v. Wiatt.

Yet it is urged here that "we must leave the premium paid by the insured to be disposed of according to the terms of his contract with the insurer." No such terms exist. There is no contract between Pyle as the "insured" and the company as the "insurer." Under the policy Pyle never was insured, and the company never was an insurer of Pyle. The policy has always been void, and this claim, based on the contract, is as void as the policy. From all that appears Pyle was not in fault, and the agent should not have obtained the premium, and the insurance company should not retain Pyle's money.

Of course, we have not considered how far the provisions of such a policy may be waived by the acts of the parties, nor to what extent such parties may be bound by their subsequent acts, and in connection with such provisions, and what was done in procuring such application and policy. The court did not err.

Judgment affirmed.

ARCADE HOTEL CO. V. WIATT.

(44 Ohio St. 33.)

Innkeeper — who is guest.

The keeper of a gambling house closed his night's business at two o'clock A. M.; visited an inn in the same city to deposit his money for safe-keeping; inquired of the clerk for lodgings, for the night, stating that he did not desire to go to his room at that time, but wished to leave some money with the clerk, and would return in about half an hour. The clerk promised to reserve a room for him. He did not register, and no room was assigned him. He left his money with the clerk, received a check for it, and departed. He returned in about three hours to have a room assigned him and go to bed. The clerk had absconded with the money. *Held*, that he was not a guest and the innkeeper was not liable.*

ACTION to recover money. The opinion states the case. The plaintiff had judgment below.

Perry & Jenney, for plaintiff in error.

Campbell, Butts & Battman, for defendant in error.

OWEN, J. [Minor matter omitted.] 1. Was Wiatt a guest at

* See *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112, 119, note.
VOL. LVIII — 99

the hotel at the time he delivered to the clerk the package containing the money involved in suit? This is the vital issue in the case. That the money was deposited and lost is assumed. It is maintained by defendant in error that this was a question of fact, and that the judgment of the trial court upon the evidence is conclusive.

Conceding that there was substantial conflict in the evidence upon this issue, the position of counsel is well chosen. If however the facts are definitely ascertainable from the undisputed evidence, whether Wiatt was a guest of the hotel is a question of law. We do not undertake to weigh conflicting proof. If there was evidence fairly tending to prove Wiatt a guest of the hotel at the time he deposited his money with the clerk, the judgment below is, upon that issue, conclusive. If however the evidence offered upon this issue, construed most favorably to the plaintiff below, does not fairly tend to establish that relation, it is our duty to say, as a legal conclusion, that the judgment below is erroneous.

The arguments of counsel, aside from the alleged error in admitting the statements of Holloway, and whether Wiatt was a guest, are chiefly addressed to the question whether Wiatt, being a resident and householder of the city of Cincinnati at the time he left his money with the clerk of the hotel, and not in any sense a traveller, was capable of becoming a guest of the hotel, and of charging its proprietor with the safe-keeping of his money. Without entering upon the consideration of the question, we are content to assume, without deciding, that Wiatt was so capable of becoming a guest, and to proceed with the consideration of the proof which is relied upon to establish such relation.

It must be conceded, that unless the relation of innkeeper and guest subsisted between Wiatt and the proprietor of the hotel at the very time the money was received by the clerk, or at the time of the loss, no recovery could be had for such loss.

[Omitting details of testimony, sufficiently indicated in head-note.]

At the time the clerk took charge of his money, Wiatt had not registered his name; it was not entered upon any of the books of the hotel; no room had been assigned him; and while it is not necessary to contend that all or any of these facts were necessary to constitute him a guest of the hotel, they are valuable aids in determining, in the light of the other proof in the case, whether that

relation in fact existed. There is no proof which may account for his failure to register. Still if he had registered, and this is shown to have been for the purpose of securing a safe depository for his money, it would not avail him.

It will not do to contend that the deposit of his money contributed to constitute him a guest. Unless he was a guest, the clerk had no authority to bind his principal by receiving the money.

In *Carter v. Hobbs*, 12 Mich. 52, it is held: "In order to make one liable as innkeeper at the common law, for goods lost at his inn, it must appear that he was acting in the capacity of innkeeper on the occasion when the goods were received, and that the owner was his guest; in other words, that the latter visited the inn for purposes which the common law recognizes as the purposes for which inns are kept."

In *Gelley v. Clerk*, Cro. Jac. 188, defendant was an innkeeper at Ubridge. Plaintiff was his guest. Plaintiff left his goods at the inn, and went to London, saying he would return in two or three days. He returned within three days and found his goods had been stolen. Action on the case was brought for the value of the goods, and it was held: "If one come to an inn and leave his goods and horse, and go into the town, and afterward return, and in the meantime his goods are stolen, no doubt but he is a guest, and shall have a remedy. And so was *Sir Edwin Sunds'* case, for his absence in part of the day is not material, but he is always reputed as a guest. So where one leaves his horse at an inn, to stand there by agreement at livery, though neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the innkeeper hath a valuable consideration; and if the horse be stolen, he is chargeable with an action, upon the common custom of the realm. But as in the case at the bar, where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from hence for two or three days, although he saith he will return, yet he is at his liberty, and therefore is not a guest during that time, nor is the innkeeper chargeable as a common hostler for the goods stolen during that time, unless he make an especial promise for the safe-keeping of them; and the action should be grounded upon it."

In *Grinnel v. Cook*, 3 Hill, 485; s. c., 38 Am. Dec. 663, the court held: "An innkeeper is bound to receive and entertain travellers. If a traveller, having stopped at an inn, leave his horse

there and go out to dine or lodge with a friend, he does not thereby cease to be a guest. The same rule holds good, so far as relates to property, for the care and keeping of which the innkeeper is to receive a compensation, though the traveller leave the inn to go to a neighboring town, intending to be absent several days. Otherwise however in respect to inanimate property, from which the host derives no advantage."

"If a traveller leave his horse at an inn, he shall be deemed a guest, even though he lodges elsewhere; but not, if he leave any dead thing as luggage." Whart. Innkeepers, 76.

An innkeeper is not bound to receive the goods of a person who only desires the use of the inn as a place of deposit. Whart. Innkeepers, 56; *Bennett v. Mallor*, 5 T. R. 274; *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303.

The inquiry is suggested here, in the light of the citation from *Curter v. Hobbs*, *supra*: Did Wiatt visit the hotel, on the morning in question, "for purposes which the common law recognizes as the purposes for which inns are kept?"

That he did not stand in need of, and that he did not desire nor ask for, the present accommodations of that hotel, at the time he first stood at its office counter, is so overwhelmingly established by the proof, as to exclude every other conclusion.

[Omitting testimony,]

The one answer to the inquiry as to the purpose of his first visit at that hotel at two o'clock in the morning is, he sought it as a safe depository for his money, that he might be free to follow the promptings of his own will and pleasure for the balance of that night with no risk of its loss. This is the only rational conclusion from the testimony, and furnishes the true solution of his failure to register, of the absence of his name from all of the books of the hotel; of the fact that no room was assigned him; that he did not insist upon having a room assigned; that he did not ask or desire to be shown to a room; that it was after five o'clock in the morning when he returned to the hotel; and to all that transpired during his first visit there.

Innkeepers are not liable as such for goods deposited with them by any but guests of their inns. While an individual proprietor of an inn may incur a liability as bailee for the safe-keeping of goods which he has voluntarily undertaken to keep for others than guests, it is not within the course of employment of a mere clerk of such

Adams v. Young.

innkeeper to receive on deposit the goods of any except guests of the inn, and if he does so, it is a transaction between him and the owner, and no liability for the loss of such goods attaches to the innkeeper.

It will be observed that we have confined the consideration of this branch of the case to the simple question: Was Wiatt a guest of Hotel Emery at the time of the deposit of his money with its clerk? If he was a guest at that time, his subsequent conduct did not dissolve or affect the relation existing at the time of such deposit. If that relation did not exist at that time, his subsequent conduct could not create it; although if the direct evidence upon that issue had been involved in conflict, it would have been proper to consider such subsequent conduct in determining the actual relation of the parties at the time of such deposit.

As the evidence did not fairly tend to prove Wiatt a guest of the hotel at the time of the deposit of his money, there was error in rendering judgment for him, and in overruling the motion for new trial.

Judgment reversed and cause remanded.

ADAMS V. YOUNG.

(44 Ohio St. 80.)

Negligence — communication of fire — intervening building.

In an action of damages for the negligent communication of fire, it is no defense that the fire was directly communicated from an intervening building to the premises in question, which were two hundred feet from the building first ignited. (*See note, p. 795.*)

ACTION for negligent destruction of personal property in a dwelling-house by fire. The opinion states the point. The plaintiff had judgment below.

Isaiah Pellers and T. J. Godfrey, for plaintiff in error.

LeBlond & Loughridge, for defendant in error.

FOLLETT, J. Was the negligence of Adams the proximate cause of the loss sustained by Young? The law does not regard an in-

jury from a remote cause. There is no dispute as to the legal proposition; the difficulty is as to its proper application to the particular case.

The sustaining the demurrer to the second defense is the only complaint of the plaintiff in error. There is no complaint of the trial on the first defense, in which the jury found against the plaintiff in error, and in which the jury must have found that his negligence was the proximate cause of the loss of the goods.

Does the second defense show, as a matter of law, a bar to Young's recovery? This defense is that the fire which burnt and consumed the property was communicated to the house of Crawford by sparks and cinders from the stable, and from the house of Crawford to the house where the property was situated, and then to the property.

It is not claimed that this fire was not the same fire communicated to the stable by sparks from the smoke-stack, when Adams' agent negligently and carelessly fired up and started the machinery. So from the petition and answer, it is shown that the fire started by Adams is the fire that consumed the goods.

Adams does not aver or claim that there was any new agency or cause at any point of the line of this fire, and does not aver or claim that the "gale of wind" increased in force or changed in direction.

The stable and the houses were not causes of communicating the fire, but they were only conditions of the communication, existing when the fire was started. Strictly the law knows no cause but a responsible human will; and when such a will negligently sets in motion a natural force that acts upon and with surrounding conditions, the law regards such human actor as the cause of resulting injury. "As a legal proposition, we may consider it established, that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced from liability for such injury." Whart. Neg., § 85.

Adams does not aver his ignorance of the surrounding conditions, or that there was any thing unusual about them, or any change as to them.

The objection as to distance through the air is disposed of by the averments of the answer, that the fire was thus communicated, the surrounding conditions being as they were, and no other cause being

Adams v. Young.

shown. There is no averment this loss is not a probable and ordinary result of the negligence of the plaintiff in error; and this principle is an important test, if it is not the only test. Whart. Neg., § 150.

Ryan v. New York Cent. R. Co., 35 N. Y. 210, and *Pennsylvania R. Co. v. Kerr*, 62 Penn. St. 353; s. c., 1 Am. Rep. 431, have been referred to as decisive here. The courts rendering those decisions have sufficiently "distinguished and explained" them.

In case of *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420; s. c., 10 Am. Rep. 389, FOLGER, J., on page 427, says: "I do not understand * * * that the decisions in 35 N. Y., and 62 Penn. St., *supra*, put forth any new rule of law, or one which has not been acted upon and recognized, *pari passu*, with the recognition and growth of the principles upon which most of the cases above cited are based. In *Ryan's* case, the opinion of the court was that the action could not be sustained, for the reason that the damage incurred by the plaintiff was not the immediate but the remote result of the negligence of the defendant." He then says, *Kerr's* case is the same in material facts, principle and reasoning. And he then says, page 428, "I am of the opinion, that in the disposition of the case before us, we are not to be controlled by the authority of the case in 35 N. Y. more than we are by that of the long line of cases which preceded it." And the court there held, "He who by his negligence or misconduct creates or suffers a fire upon his own premises, which burning his own property spreads thence to the immediately adjacent premises and destroys the property of another, is liable to the latter for the damages sustained by him." And on the facts there, also held, "In an action for the damages, that the questions as to whether defendant was negligent in the use of its property, and as to whether the injury was a probable consequence of the negligent acts and omissions, were properly submitted to the jury."

In *Pennsylvania R. Co. v. Hope*, 80 Penn. St. 373; s. c., 21 Am. Rep. 100, Chief Justice AGNEW says, on page 379: "But let us examine the case of *Railroad Co. v. Kerr*, and it will be found to be free from much of the criticism expended upon it." "It was not held in *Railroad v. Kerr*, that when a second building is fired from the first, set on fire through negligence, it is a mere conclusion of law that the railroad company is not answerable to the owner of the second; or that if a fire is communicated from the locomotive to

the field of A., and spreads through his field to the adjoining field of B., A. may be reimbursed by the company, while B. must set down his loss to a remote cause, and suffer in silence;" thus answering *Fent v. T. P. Ry. Co.*, 59 Ill. 362, 358; s. c., 14 Am. Rep. 13, *infra*.

And in that case the court held, "Sparks from defendants' engine fired a railroad tie, from which rubbish left by the defendants on their road was fired, communicated with plaintiff's fence next to the road and spread over two fields, burned another fence and standing timber six hundred feet distant from the road. Held, that the proximity of the cause was for the jury.

"In such case the jury must determine whether the facts constitute a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of defendants."

In the opinion the chief justice says, page 378, "In determining this relation, it is obvious that we are not to be governed by abstractions, which in theory only cut off the succession. Abstractly each blade of grass or stock of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real but combustible division line. * * * It is at this point the province of the jury takes up the successive facts, and ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off or separated by a new and independent cause."

Some States, as Massachusetts and New Hampshire, have provided by statutes that railroad companies shall be liable for damage caused by fire communicated by its locomotive engines. And in *Perley v. Eastern R. Co.*, 98 Mass. 414, damage was recovered for injury to property situated half a mile distant from the railroad.

In the State of Kansas, damage has been recovered for injury to property situated many miles distant from the origin of the fire. *Atchison, T. & Santa Fe R. Co. v. Stanford*, 12 Kan. 354; s. c., 15 Am. Rep. 362. In case of *Atchison, T. & Santa Fe R. Co. v. Bales*, 16 Kan. 252, it was held: "Where fire, which is negligently permitted to escape from an engine of a railroad company, does not fall upon the plaintiff's property, but falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble and other combustible materials, and passes over the land

Adams v. Yeang.

of several different persons, before it reaches the property of the plaintiff, and finally reaching the property of the plaintiff at a great distance from where the fire was first kindled, sets it on fire and consumes it, held, that the negligence of the railroad company, in such a case, is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company."

In case of *Poeppers v. M. K. & P. Ry. Co.*, 67 Mo. 715; s. c., 20 Am. Rep. 518, sparks from the locomotive set fire to the prairie where the grass was rank. The wind was high and the fire extended three miles before night, then died down, and the next morning the wind rose and carried the fire five miles further, where the fire destroyed plaintiff's property. The court held, "that as the rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company from the consequences of its negligence in permitting the fire to escape; and that the fire was in fact one continuous conflagration, notwithstanding the lapse of time and the great distance over which it travelled before reaching plaintiff's property." In Missouri this may be correct.

In *Del., Lack. & West. R. Co. v. Salmon*, 39 N. J. Law, 300; s. c., 23 Am. Rep. 414, the court held, "Where one, by negligence or misconduct, occasions a fire on his own premises, or the premises of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal proposition, too far removed from his negligent act to involve him in legal liability." And *Ryan v. New York Cent. R. Co.*, and *Pennsylvania R. Co. v. Kerr*, *supra*, are disapproved.

The case of *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69, was fully considered, and the court held, "The maxim, *causa proxima non remota spectatur*, is not controlled by time or distance, nor by the succession of events. An efficient adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The maxim includes liability for all actual injuries which were the natural and probable result of the wrongful act or omission complained of, or were likely to ensue from it under ordinary circumstances. And *Ryan v. New York Cent. R. Co.* and *Pennsylvania R. Co. v. Kerr*, *supra*, are disapproved.

In the case of *Fent v. Toledo, Peoria & Warsaw Ry. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13, the opinion, delivered by Chief Justice LAWRENCE, disapproves of *Ryan v. New York Cent. & Co.* and *Pennsylvania R. Co. v. Kerr*, *supra*, and deals at length with remote and proximate causes. The court there held, "If fire is communicated from a railway locomotive to the house of A., and thence to the house of B., it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B., but that is a question of fact to be determined in each case by the jury under instructions of the court. * * *

"If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind — such a loss might fairly be set down as a remote consequence, for which the railroad company should not be held responsible."

In *Milwaukee and St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, the claim was that fire was negligently communicated from a steamboat of the company by sparks from the chimney to an elevator of the company built of pine lumber, and one hundred and twenty feet high, and standing on the bank of the river, and from the elevator to a saw-mill and lumber piles of Kellogg. The mill was five hundred and thirty-eight feet distant from the elevator, and the nearest pile of lumber was three hundred and eighty-eight feet distant from it. When the steamboat went alongside the elevator, an unusually strong wind was blowing from the elevator toward the mill and lumber. The case was from Iowa. The court held, "The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine in view of the accompanying circumstances. A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted unless it appear that the injury was the natural and probable consequence of the negli-

Adams v. Young.

gence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

In the case of *Hoyt v. Jeffers*, 30 Mich. 181, more than one building was burned by fire communicated by sparks from a mill chimney. As to the second building, the court held, "Even where such second building is at such a distance from the first that its taking fire from the first might not *a priori*, seem possible, yet if it be satisfactorily shown that it did in fact thus take fire without any negligence of the owner, or any fault on the part of any third party, which could be properly recognized as the proximate cause, and for which he could be held liable, the party through whose negligence the first building was burned cannot on principle be held exempt from equal liability for the burning of the second."

These numerous citations show many phases of this subject, and that each case must be determined by its peculiar facts, and so is largely within the province of the jury.

Here explosives are averred to have been in Crawford's house, but if they ever exploded it is not averred that any injury came from such explosion. There is shown no new cause operating after the fire was carried from the chimney of the mill on its destructive mission. The demurrer was rightly sustained, and the court did not err in affirming the judgment.

Judgment affirmed.

NOTE BY THE REPORTER.—See to the same effect, *Johnson v. Chic., etc., Ry. Co.*, 31 Minn. 57; *contra*, *Penn. Co., v. Whitlock*, 99 Ind. 16; s. c., 50 Am. Rep. 71, and note, 81.

Judge Thompson (Neg., p. 169), says: "The opinion of Chief Justice LAWRENCE, in *Fent v. Toledo, etc., Ry. Co.*, is an exhaustive and learned enunciation of the law as settled by the decisions in England and America." And of the *Kerr* and *Ryan* cases he says (p. 171): "They are condemned in every subsequent case in which they have been cited, outside of those States, and have been so qualified in those States in which they have been decided as to be practically overruled."

Sherman & Redfield (Neg., § 327a), says: "We doubt whether any of this limitation of damages can be sustained. It does not seem to be accepted in England or Massachusetts, and is difficult to support upon any intelligible principle." Written in 1874.

Cooley says of the *Ryan* case (Torts, 76), that it was apparently decided more upon a consideration of the hardship of the opposite doctrine than upon "a strict regard to the logic of cause and effect." "The negligent fire is

Cummings v. Kent.

regarded as an unity, it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would thus have intervened back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time. The slow match which causes an explosion after much time and at considerable distance from the ignition, and the libellous letter which is carried from place to place by different hands before publication, produces an injurious result which is as proximate to the cause and as direct a sequence as if in the one case the explosion had been instantaneous, and in the other the author had called his neighbors together and read to them his libel." No doubt the man who sets the stone rolling is liable for the direct injury to any number of different persons, but suppose the first person struck falls down the hill, and at the bottom strikes another, would the man who set the stone rolling be liable for the injury to the latter? That is a different question. Unless the doctrine of the *Kerr* and *Ryan* cases is law, the man who accidentally fired the cow-shed by tipping over the lamp in Chicago was liable for the conflagration of the whole city. Or suppose one should negligently keep a mad dog, which should bite another dog, and the virus should in like manner be communicated through six dogs to a man, would the keeper be liable to that man? Distance of space or time is nothing. It is true; but intervening and unexpected agencies of communication, through which space and time are bridged, are something to be taken into account.

CUMMINGS V. KENT.

(44 Ohio St. 92.)

Negotiable instrument — draft — parol evidence to vary liability.

Parol evidence of an agreement between payee and drawer that the drawer of a bill was not to be liable is inadmissible.

ACTION on bills of exchange. The opinion states the facts. The plaintiff had judgment below.

John W. Herron, for plaintiff in error.

Jordan & Jordans, for defendant in error.

OWEN, C. J. If the trial court properly excluded the evidence offered by the defendant below to prove that it was agreed, at the time the bills of exchange in suit were drawn, that he was not to be liable thereon as drawer, the judgment below should be affirmed.

Cummings v. Kent.

The real issue tendered by the answer was that Kent took the bills of exchange in payment of the debt of \$3,014.95 which was due from the defendant, Cummings, to him, and agreed to release the former from all liability for the same. A careful inspection of the answer fails to disclose any averment that Kent agreed to release Cummings from his liability as drawer of the bills, or that there was any agreement that the only purpose in drawing the bills was to effect an assignment of the debt. If we assume the facts alleged in the answer to be proved as fully as averred, they would still fall far short of establishing a defense to the action on the bills of exchange. They may have been taken in payment of the account, and Cummings thereby released from all liability thereon; but the action was not upon the account, but upon the bills given for its payment. The evidence offered was properly excluded, as being irrelevant to the issues joined.

We do not find it necessary however to rest our determination of the case solely upon this ground. Assuming for the purposes of the case, that the issues were broad enough to invite an inquiry into the facts which were sought to be proved by the evidence offered, was it competent to establish such facts by oral testimony?

The liability assumed by the drawing of a bill of exchange is clearly recognized by the law. The mere act of drawing a bill imports the most certain and precise contract, for presumed adequate consideration, that the bill shall be accepted and paid, and that if it is not, the drawer will pay it. *Wood v. Surrells*, 89 Ill. 107; *Chitty Bills*, 147. It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to or subtract from, the absolute terms of the contract. *Pars. Notes and Bills*, 501.

The evidence which the court excluded in the case at bar was offered for the purpose of proving that at the time of the drawing and delivery of the bills in suit, it was agreed between the payee and drawer that the latter should not be liable as such drawer. If this was not an attempt to contradict the plain terms of the contract as the law interprets it, it is not easy to conceive of a case which would present such a question.

Morris v. Faurot, 21 Ohio St. 155; s. c., 8 Am. Rep. 45, is cited to support the view contended for by Cummings.

This was a suit by the indorsee against the indorser of a promissory note. The defense was that the indorsement was not made in the regular course of business, but that the plaintiff had agreed with the makers to take up the note, and that "the indorsement was made with the express understanding and agreement that this indorsement was to be used by the plaintiff only as evidence to Cochran & McElroy that he had paid off their indebtedness on the note to the defendants, and that it was made for no other purpose whatever."

McILVAINE, J., says: "That parol testimony is inadmissible to contradict or vary the terms of written instruments, and that the contract of an indorser of a promissory note, whether the indorsement be in blank or otherwise, within the meaning of that rule, as general propositions of law are true, may be admitted for the purposes of this case. But the question in the case, as we understand it, was not as to the terms of the contract, or the nature or extent of the indorser's liability, but whether there was any contract at all out of which any liability could arise."

It will be seen that this case expressly recognizes the rule which the trial court, in the case at bar, applied in excluding the evidence offered "as to the terms of the contract, or the nature or extent of the liability" of the drawer.

Dye v. Scott, 35 Ohio St. 194; s. c., 35 Am. Rep. 604, is relied upon as decisive of the case at bar, in that it establishes the admissibility of the evidence which the trial court excluded. The proposition declared by the court in that case is: "Oral testimony is admissible to prove that the indorser, as between himself and the indorsee, at the time of indorsing a note in blank, waived demand and notice." We are not called upon, nor have we any disposition, to question the entire soundness of this proposition, and the language of GILMORE, J., which is relied upon by the plaintiff in error, must be read and construed in the light of the question before the court and not as declaratory of a rule which was not at all necessary to a solution of that question. The rule established by that case is supported by authorities which rigidly adhere to the principle which guided the trial court. 1 Pars. Notes and Bills, 584; Dan. Neg. Inst., § 1093; Edw. Notes and Bills, § 861; *Boyd v. Cleveland*, 4 Pick. 525; *Lane v. Steward*, 20 Me. 98; *Fuller v. McDonald*, 8 Greenl. 213; s. c., 23 Am. Dec. 499.

Wood v. Surrells, 89 Ill. 107, is an instructive case, presenting

Cummings v. Kent.

striking analogies to the case at bar. One of several judgment debtors gave a bill of exchange on a third person, whose acceptance was procured in satisfaction of the judgment. It was held that evidence of a parol agreement at the time of the drawing of the bill, to release the drawer from all liability on the draft, was inadmissible. Here the judgment was paid by the drawing and acceptance of the bill; but evidence of a contemporaneous parol agreement that the drawer was not to be liable as such, was excluded.

It was further held in this case, that the liability of a drawer of an inland bill of exchange is fixed by presenting the draft on the day of its maturity, and notice of its dishonor. It was also held that, "The rule is familiar, that an agreement cannot exist partly in writing and partly in parol, or that verbal terms or conditions cannot control the rights or liabilities of parties to commercial paper."

While there is not entire uniformity in the authorities upon the question, their decided weight will be found to support the principle that evidence is not admissible to prove a contemporaneous parol agreement that the liability of the drawer of a bill of exchange is not to be enforced. 1 Dan. Neg. Inst., § 80; *Martin v. Cole*, 104 U. S. 30; *Bigelow v. Colton*, 13 Gray, 309; s. c., 74 Am. Dec. 633; *Davis v. Randall*, 115 Mass. 547; s. c., 15 Am. Rep. 146; *Bartlett v. Lee*, 33 Ga. 491; *Day v. Thompson*, 65 Ala. 269; *Burnard v. Gaslin*, 23 Minn. 192; s. c., 23 Am. Dec. 499; *Crocker v. Getchell*, 23 Me. 392; *Fuller v. McDonald*, 8 Greenl. 213; s. c., 23 Am. Dec. 499; *Tankersley v. Graham*, 8 Ala. 247; *Stubbs v. Goodall*, 4 Ga. 106; *Wilson v. Black*, 6 Blackf. 509; *Holton v. McCormick*, 45 Ind. 411; *Stack v. Beach*, 74 Ind. 571; s. c., 39 Am. Rep. 113; *Woodward v. Foster*, 18 Gratt. 200; *Barry v. Morse*, 3 N. H. 132; *Heaverin v. Donnell*, 7 Sm. & M. 244; s. c., 45 Am. Dec. 302; *Heath v. VanCott*, 9 Wis. 510. This is also the rule in England. *Hoare v. Graham*, 3 Camp. 57; *Abrey v. Cruz*, L. R. 5 Com. P. 37; *Bell v. Lord Ingestre*, 12 Q. B. 317; see also *Forsythe v. Kimball*, 91 U.S. 291; *Specht v. Howard*, 16 Wall. 564.

Judgment affirmed.

Ex parte Dalton.

EX PARTE DALTON.

(44 Ohio St. 143.)

Constitutional law—contempt—refusal to produce books before legislative committee.

A standing committee on elections of a house of the legislature, with power to send for persons and papers, may command a clerk of a court of common pleas, having custody of a poll-book, to produce it on an investigation, although this may involve the removal of the book to another county than that of his office; and on his refusal such house may commit him for contempt.

HABEAS CORPUS. The opinion shows the case.

Baker & Goodhue, for petitioner.

Jacob A. Kobler, attorney-general, *George K. Nash*, and *Jesse L. Cameron*, for respondent.

OWEN, C. J. 1. It is maintained on behalf of the petitioner that neither the house of representatives nor its committee had power to command him to remove any of the poll-books committed to his custody from his office and take them out of his county. This claim is based upon the assumption that section 2961 of the Revised Statutes requires that the poll-books shall remain in his office and not be removed therefrom under any circumstances.

This section provides that: "After canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same and direct it to the clerk of the Court of Common Pleas of the county; and one of the judges (to be determined by lot, if they cannot otherwise agree), shall convey the same to the clerk at his office, within three days from the day of election; and the other poll-book shall be forthwith deposited with the clerk of the township, or the clerk of the municipal corporation, as the case may require, there to remain for the use of any person who may choose to inspect the same after the expiration of the time within which any legal notice of the contest could be given."

Ex parte Dalton.

It requires but a casual examination of this section to show that the contention of the petitioner proceeds upon a misconstruction of it; that the words "there to remain" have relation not to the poll-book which is to be conveyed to the clerk of the Court of Common Pleas, but to "the other poll-book," which is to be deposited with the clerk of the township or municipal corporation.

That this position of the petitioner is untenable, clearly appears from the provisions of sections 2998, 2999, and 3001, 3003, 3004 Rev. Stats. These sections are more fully considered in the third paragraph of this opinion. They clearly contemplate a trial before that branch of the general assembly to which a contest is taken on appeal, and the production before such house, or a committee acting for it, of the returns of an election which is being investigated.

The right of the house to command the production before it, or its committee, of the papers named in the subpoena, and of the witness to produce them, is clear.

2. It is further maintained in behalf of the petitioner, that even if it was lawful for him to produce before the committee at Columbus the poll-book demanded, the house had no power, upon his refusal to produce it, to commit him as a punishment for contempt of its authority.

The case of *Anderson v. Dunn*, 6 Wheat. 204 (decided by the Supreme Court of the United States in 1821), declared the doctrine that representative bodies in America possessed inherently the power to punish for contempt. For sixty years following this decision, its authority remained unquestioned in this country. The repeated and unqualified declarations of this principle by courts and text-writers are to be traced to this case. *Mourice v. Dyer*, 2 Greene, 165; *Yates v. Lansing*, 9 Johns. 395; s. c., 6 Am. Dec. 290; 1 Burr's Trial, 352; *United States v. Hudson*, 7 Cranch, 32; 1 Kent Com. 300; *United States v. New Bedford Bridge*, 1 W. & M. 401; *Tenney's case*, 23 N. H. 162; *State v. Copp*, 15 N. H. 212.

The later case of *Kilbourn v. Thompson*, 103 U. S. 168, is relied upon by counsel for petitioner as an authority in support of his position, and as overruling *Anderson v. Dunn*.

In the case of *Kilbourn v. Thompson*, the plaintiff had, on proceedings similar to those taken in the present case, been convicted of a contempt, and sentenced by the house of representatives of Congress to imprisonment. It appeared on the face of the proceed-

ings, that the contempt consisted of his refusal to answer a question propounded by a committee of the house appointed by a resolution, which was set forth. This resolution directed the committee to investigate certain business transactions in which the United States government was interested simply as a creditor of one of the parties, and that the Supreme Court held that the preamble and resolution under which the committee was appointed showed upon their face that the investigation ordered did not have for its object any legislative action, or the impeachment of any officer of the government, but the collection of a debt owing to the government, a power which Congress could not exercise, but which was vested only in courts of justice; that in ordering such an investigation, the house of representatives exceeded the limits of its powers, and consequently the committee had no authority to require the plaintiff to testify before it. On this sole ground, the decision of the court was placed, but in arriving at this conclusion, several important points, which have a bearing upon the question now before us, were discussed in the highly instructive opinion of Justice MILLER.

It may be conceded that so far as *Anderson v. Dunn* declared the doctrine that representative bodies in this country possess, inherently, the general and unlimited power to punish for contempts, it is overruled by *Kilbourn v. Thompson*, but so far as it has application to the questions now before us, its authority remains unshaken by the latter case.

This is apparent from the following language of the syllabus of *Kilbourn v. Thompson*: "*Held*, that although the house can punish its own members for disorderly conduct, or for failure to attend its sessions, and can decide cases of contested elections, and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, where the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness — there is not found in the Constitution of the United States any general power vested in either house to punish for contempt."

In the course of a very learned and able opinion, Justice MILLER says: "Each house is by the Constitution made the judge of the election and qualification of its members. In deciding on these, it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may

Ex parte Dalton.

be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature."

Here is a recognition of the power which the house exercised in the case at bar.

The case of *McDonald v. Keeler*, 39 Hun, 563, which is relied upon by the petitioner, is not an authority against the power of the house to commit for contempt, a witness in an election contest, for the reasons (1) that as counsel concede, it was reversed by the Court of Appeals of that State (99 N. Y. 463); s. c., 52 Am. Rep. 49; and (2) that while denying the power of a branch of the general assembly to punish for contempt in the peculiar case before it, LEARNED, J., qualified the general rule in the following language:

"Here, then, we must notice that by the Constitution the legislature has certain judicial powers. Each branch is the judge of the qualifications of its own members. This power is judicial in character, though often partisan in fact. There is a power to remove certain judicial officers. There is a power of impeachment. These are judicial powers. They imply a decision on past occurrences, and a giving judgment accordingly. It may be therefore that in all actions of this kind, the senate and assembly may rightfully enforce the same power of punishing for refusing to answer questions which is exercised by courts. These cases therefore we exclude from consideration."

The Constitution of Ohio ordains (art. 2, § 6) that:

"Each house shall be judge of the election, returns and qualifications of its own members."

The house of representatives was exercising, through its committee, the power thus conferred, at the time of the commitment of the petitioner.

The power to enforce the attendance and testimony of witnesses, and the production of papers affecting the election of its members, is indispensable to the efficient exercise of the power conferred.

That the power to commit a recusant witness for contempt in disobeying the command of a subpoena issued in the due course of an investigation affecting the election of any of its members, is invested in each house, is now too firmly established to be considered a debatable question.

Ex parte Dalton.

Anderson v. Dunn, 6 Wheat. 204; *Kilbourn v. Thompson*, 103 U. S. 168; *McDonald v. Keeler*, 39 Hun, 563; s. c., 99 N. Y. 463; s. c., 52 Am. Rep. 49; *Rapalje Contempts*, § 2, and cases there cited.

3. Counsel for petitioner maintains, further, that the only power conferred by statute on each house to proceed against a disobedient witness for contempt of its authority is derived from section 52, Revised Statutes, and that the power therein attempted to be conferred is too vague and indefinite regarding the mode of punishment to be capable of legal enforcement.

Section 50, Revised Statutes, provides: "That a chairman may issue subpoenas;" section 51 provides to whom subpoenas shall be directed, and how served, and the form; and section 52 provides punishment for disobeying the subpoena, or refusing to answer, or refusing to produce books or papers.

Section 52 provides: "Whoever willfully fails to appear in obedience to such subpoena, or appears and refuses to answer any question pertinent to the matter of inquiry, or declines to produce any paper or record in his possession or control, shall be liable to the pains and penalties for contempt of the authority of the general assembly * * * according to parliamentary rules and usages in case of contempt; and the chairman of the committee before which such person fails to appear, or refuses to answer, or produce a paper or record, as aforesaid, on the order of the committee or a sub-committee, shall report the facts to the proper branch of the general assembly, on like order, issue a warrant for the arrest and conveyance of the witness before that branch, to answer for the contempt; and the sergeant-at-arms, or sheriff, to whom such warrant is directed, shall forthwith execute the same," etc.

Rules have been adopted by the house to effectuate the provisions of this section.

Counsel for petitioner repeatedly asserts, during his argument, that it is conceded that the only statutory power to commit for contempt is to be found in this section (52). By whom this concession is made we are not advised. Certainly, this court has not made, nor is it bound by any such concession.

On the contrary, we find that express statutory power is given to make the order by which the petitioner was placed in the custody from which he seeks to be discharged by the proceeding we are reviewing.

Ex parte Dalton.

Section 3003, Revised Statutes, provides, generally, for an appeal to, and contest before, either branch of the general assembly, of the right of a person declared elected thereto. Section 3004 provides that the provisions of sections 2998, 2999 and 3001 (relating to contests for county offices), shall apply to contests for seats in the general assembly. Section 2998 provides, that the officers authorized to take depositions may issue "*subpoenas duces tecum* for the production of the books, papers, ballots, or things relating to such election; and they may compel the attendance of witnesses, and the production of every thing named in the subpoenas."

Section 2999 provides that: "Whoever refuses to obey such subpoena *duces tecum*, or to produce any books, papers, ballots, or things in his possession, or under his control, named in such writ, shall be committed to the jail of the county by the justices or other officer; there to remain until he produces the things called for."

Section 3001 provides that: "On the trial either party may introduce oral testimony, or depositions of witnesses taken as provided in civil actions; and whenever any omission, defect, or error occurs in the proceedings of an officer, in declaring or certifying that a person was duly elected to an office, the same may be corrected by oral or other testimony offered at the hearing of any preliminary proceeding, or at the trial."

These provisions, having been thus engrafted upon those for contest for membership of either house, furnish specific warrant for the action of the house in the case before us. This renders unnecessary any further discussion of the provisions of section 52, or the rules of the house, so far as they relate to commitment of witnesses for contempt.

4. The questions we have been considering were incidentally involved in the case of *Dalton v. State*, 43 Ohio St. 652. This court there held that the jurisdiction conferred by the Constitution upon each house to "judge of the election returns, and qualifications of its own members," is supreme and exclusive, and that: "In a contest in either house, the broadest range is given contestants to purge the ballot and returns of the consequences of neglect, mistake, fraud and crime, from the opening of the polls to the final declaration of the result."

The pertinency of this language to the case before us is emphasized by the fact that it was used with reference, among other things, to the very paper (then before this court) whose production was

Manhattan Life Insurance Company v. Smith.

commanded by the subpoena issued in the case at bar. It was used to support the proposition that a contest before either house afforded a complete and adequate remedy for fraud, neglect, or crime at the election or in making up the returns thereof. If it be true that neither house of the general assembly has power to compel the production before it, or a committee acting for it, in the trial of a contest involving the election of a member, of the returns and other papers affecting such election, the declaration of this court in the case last cited is but a false pretense, and a contest in either house is not an adequate remedy for the contestant.

The parties to such a contest are entitled to the enlightened judgment of each member of the house upon the questions involved in the contest.

Where a full understanding of such questions requires a personal inspection of the returns of the election, it is the right of each party to the contest to ask that they be brought within reach of each member whose vote is to aid in the final determination of the contest. With the thoroughness of the investigation dependent wholly upon the pleasure or caprice of witnesses, and without the power to enforce their attendance and testimony and the production of papers, by such means, if necessary, as the house of representatives used in the present case, it would be worse than an absurdity to say, as did this court in the case last cited, that: "In a contest in either house the broadest range is given contestants to purge the ballot and returns of the consequences of neglect, mistake, fraud and crime, from the opening of the polls to the final declaration of the result."

Judgment affirmed.

MANHATTAN LIFE INSURANCE COMPANY V. SMITH.

(44 Ohio St 153.)

Insurance — life — husband for wife — change of beneficiary — notice.

An insurance policy was issued to a wife on the life of her husband, entitling the wife to have the profits applied on the premiums annually. The husband kept the policy and paid the premiums. The husband and wife separated, and the company knowing this fact, and without notice to the wife entered into negotiations with the husband for a surrender and for the issue

Manhattan Life Insurance Company v. Smith.

of a new policy payable to his estate, pending which the husband died leaving a premium due and unpaid, of which the wife was not notified. *Held*, that the company could not forfeit the policy.*

ACTION on a life insurance policy. The opinion and head-note state the facts. The plaintiff had judgment below.

McGuffey & Morrill, for defendant.

John W. Herron and *Nathaniel H. Davis*, contra.

SPEAR, J. At the outset we inquire: Had the husband, independent of any relation as agent for the wife, power to surrender the policy? He could stop paying premiums. That would have left the wife to continue the policy in force for its full amount by herself making payment of premiums; or she could have declined to pay and received a paid-up policy for a lesser amount, and this she would do, not by the grace or favor of the company, nor yet by virtue of any new agreement with the company, but by force of the original contract and the law applicable thereto.

It is now too well settled to admit of dispute that a beneficiary, for whose benefit a promise has been made by one upon a sufficient consideration moving from a third person, may maintain an action upon that promise; and if the beneficiary has acted on the promise so as to have changed position, or acquired a vested right, the contract cannot be changed without his consent. The case at bar is a stronger case than the one supposed, in that the application was made in the name of the wife and the contract itself made directly with her, though the risk was on the life of the husband. There was value in the policy, and at least to that extent the wife's right in it was a vested right. She was the beneficiary named in it, and upon both reason and authority we think it clear that no new contract or arrangement of any kind which affects the vested rights of the beneficiary in the policy can be made with the company alone by the insured. Bliss on Life Insurance, sections 337, 345, 571, and the cases cited by counsel, abundantly sustain this position. We conclude that the husband, in this case, had no power to surrender the policy merely because he was the insured party and had paid premiums. Had he any other standing regarding the transactions which gave him such right? In the payment of premiums he,

* See *Nat. Life Ins. Co. v. Haley* (78 Me. 268), 57 Am. Rep. 807.

Manhattan Life Insurance Company v. Smith.

in law, was her agent. If he had the right to act for her at all it was because of this relation as agent. Was he her agent at the time he attempted to surrender this policy? and what was the company, with the knowledge furnished by the letters as to his attitude toward his wife, bound to understand? By his letter of April 27. in which he inquires if the policy could be transferred, he gave the company to understand that he was seeking a result on the face of the transaction inconsistent with her interests. This was, of itself, significant and suggestive. And when it was followed by the letter of May 3, giving the information that his wife had separated from him and sued for alimony, and renewing his request that the policy be made payable to his estate because he was obliged to provide her with alimony, and because she was no longer a wife to him, it is idle to claim that the company was not apprised of facts from which it was bound to presume that his relation of agent had ceased. He could not have made the fact clearer had he included a direct statement to that effect. The relation of principal and agent implies trust, confidence. Here was an antagonism and a direct effort to sacrifice her rights for his benefit. The company was bound to know that as agent he could not lawfully do that. The husband not having any authority then, either by reason of having paid premiums, or by his position as the insured in the policy, nor yet as agent for the wife, to make a surrender, it follows that the attempted surrender of the policy was inoperative, and that the rights of the beneficiary were not impaired by the attempt.

But the company claims, that independent of the question of surrender, there can be no recovery beyond the sum of \$810. because the policy was forfeited by the failure to pay the premium due June 4, 1880. To this it is replied that there could be no forfeiture without notice to the beneficiary, such as had been uniformly given during the entire life of the policy, and that she had not, up to the commencement of the suit, been notified either of the amount of the premium to be paid, or of any purpose on the part of the company to forfeit the policy. On this question of notice the company insists that the notice given the husband was, in law, a notice to the wife, for that whatever was the fact as to his agency at the time his letters to the company were written; they do not show when the separation took place, and for all that appears, it was after the notice of April 24, 1880, was received by him. We confess we are unable to perceive the force of this claim. As early

Manhattan Life Insurance Company v. Smith.

as the 29th of April, five days after the notice was mailed, the company was apprised that Smith was acting contrary to the interests of his wife, and seven days later a full disclosure of his purpose was made. In the light of these facts, and of the irresistible inferences to be drawn from them, it will hardly do to claim seriously that the company was justified in assuming that he was agent for the wife April 24th. As matter of fact, the alimony suit had then been pending about six months. It being shown therefore that notice to the husband was not notice to the wife, and it appearing further that she had no actual notice, we are led to inquire what effect this state of facts has upon the rights of the parties?

It will be borne in mind that by the contract Mrs. Smith was entitled to share in the profits of the company, and that as to part of these profits, they were paid out by annual dividends, the remaining portion being retained by the company and insuring to her benefit by accretions to the policy, and that the uniform custom had been that the company should give timely notice, not only of the date when the amount to be paid as premium would become due, but as well the amount of the dividend and the amount of balance to be paid in cash. What dividend in any year was declared, and what amount could be used to reduce the premium were facts known to the company, but not to the insured. Without this information the insured or beneficiary could not, in the ordinary course of business, know how much was to be paid as premium each year, and could not therefore pay it. The case is to be distinguished from one where the premium is a fixed amount; and from a case, slightly differing, where although there may be dividends which the policy-holder, at his option, may have applied as the premium, yet there is no agreement and uniform practice that the dividends are to be deducted each year from the premium and the balance only paid to the company. It may probably be safely conceded that in either of the two supposed cases the assured would have no right to depend upon a notice from the company, not even if the company had ordinarily sent such notice. For the very life of successful life insurance depends upon prompt payment of premiums, and their business would be thrown into utter confusion if companies had no means of protecting themselves by forfeiture for non-payment of premiums. But while this is true, the contract is nevertheless an entire one of assurance for life, and the

Manhattan Life Insurance Company v. Smith.

payment of the premiums, after the first, is not a condition precedent, but a condition subsequent, and the parties may deal in such way between each other as to estop the company from insisting upon a forfeiture where it would be inequitable for a forfeiture to be declared.

Can the company insist upon a forfeiture in this case? The premiums were paid regularly for sixteen years; the company undertook to make a new contract with a person wholly without authority to act for Mrs. Smith, ignoring her altogether; her residence was given in the application as at Cincinnati, and the presumption would be that she continued to reside there; the exact place of residence was not hard to find; the company had an agent in the city all the time, and could without trouble have given her notice, but no effort even of the slightest character was made to acquaint her with that which she, of all persons, was interested in knowing and entitled to know. Courts are liberal in construing transactions in favor of the avoidance of a forfeiture. There are no presumptions in favor of a right by forfeiture, for forfeitures are abhorred in equity, and are never favored in law. Upon the facts shown it appears manifest that this claim of the insurance company is inequitable, and we are of opinion that it is not maintainable in law.

A recent case, decided by the Supreme Court of the United States, is believed to entirely cover the question here involved as to the effect of failure to give notice. We refer to *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, and quote from it sufficiently to show its application to the case at bar. The policy was issued September, 1871, upon the life of Jackson Riddle, in consideration of the payment by the wife and children of the insured (who were named as payees in the policy) of the sum of \$215, and the annual payment of a like amount on or before the 20th of September, in every year during its continuance, and contained a stipulation that if the premiums be not paid on or before the day of maturity the company should not be liable for any part of the sum insured, and the policy to cease and determine, all previous payments being forfeited. The policy was upon the half-note plan, which gave the insured the right to discharge one-half of the first four premiums by notes, and upon the fifth and subsequent payments to have his dividends, if any, applied in reduction of the premiums. Notices were sent to the insured prior to the 20th of September, in 1872, 1873 and 1874,

Manhattan Life Insurance Company v. Smith.

showing when premiums became due, amount of cash to be paid, interest on the notes, and amount for which additional note was required. Prior to the 20th of September, 1875, notice to the insured was sent, which stated amount of dividend to be applied in reduction of that premium, interest to be paid on notes previously executed, and the sum to be paid in cash.

On the 6th of October, 1876, the insured lost his life in a railroad accident, leaving unpaid the premium due on the 20th of September, previous, though before starting from home he had made arrangements to pay the amount required as soon as notice was received. His residence and post-office for more than a year had been at Oxford, Ind., which was known to the company's general agent at Chicago. On the 4th of October, 1876, there was sent from the general agent's office, addressed, by mistake, to the insured at Fowler, Ind. (where he never resided), a notice similar to that given in 1875. This was received by a son of the insured the day the father was killed. On the 9th of October, 1876, the amount due was tendered to the company's general agent at Chicago. He declined to receive it, on the ground that the policy lapsed, by reason of nonpayment of premium due, the 20th of September, 1876.

On the trial in the Circuit Court the court charged the jury, among other things, to the effect that "if they found from the evidence that it had been the invariable custom of the company to transmit to the insured a statement of the amount of the premium due, after deducting the dividend, with a notice of the time when, the place where, and the person to whom, the premium could be paid, then the insured had good reason to expect and rely on such statement and notice being sent to him, and that if the company, by its managing agent, had notice of the post-office address of the insured before the usual time of sending out notice, but failed and neglected to transmit such statement and notice until the 4th of October, and the same did not reach him or the payees in the policy until the sixth, and that the insured or payees were ready and waiting to pay said premium when notice and statement should be received, and by reason of such failure to send the notice and statement, and of that alone, the premium due in September, 1876, was not promptly paid, and that in a reasonable time thereafter the payees tendered the full amount of the premium, then the policy did not lapse or become forfeited, notwithstanding the premium was not

Manhattan Life Insurance Company v. Smith.

paid on the day named in the policy, and in the life-time of the insured."

A judgment was rendered against the company and the case taken upon error to the Supreme Court. The opinion was delivered by Mr. Justice HARLAN, who in commenting upon this part of the charge, uses this language: "We are of the opinion that these propositions are substantially correct. Nor do we perceive that the rulings of the court below are in conflict with our decision in *Thompson v. Ins. Co.*, 104 U. S. 252. * * * The present case has features which plainly distinguish it from the *Thompson* case. In the former there was a tender of the premium within a few days after the death of the insured, and as soon as the payees ascertained the sum required to be paid. In the latter, the amount to be paid was fixed. It was not liable to be reduced on account of dividends, or for any other reason, and the insured therefore knew the exact amount to be paid in order to prevent a forfeiture of the policy. Now although the policy issued upon Riddle's life required payment annually of a specific sum as a premium, that stipulation must be construed in connection with the agreement set out in the application, that the premium might be discharged *pro tanto* by such dividends as were allowed to the insured from time to time. Whether the company, in any particular year, declared dividends, and what amount was available in the reduction of the premium, were facts known, in the first instance, only to the company, which had full control of the matter of dividends. It certainly was not contemplated that the insured should every year make application, either at the home office or at the office of its general agent in Chicago, in order to ascertain the amount of dividends. The understanding between the parties upon this subject is, in part, shown by the practice of the company. Independently of that circumstance, and waiving any determination of the question whether the forfeiture was not absolutely waived by the act of the general agent, in sending notice to the insured after the day fixed for the payment of the premium due September 20, 1876, it was we think the company's duty, under any fair interpretation of its contract, having received information as to the post-office of the insured, to give seasonable notice of the amount of dividends, and thereby inform him as to the cash to be paid in order to keep alive the policy. It did, as we have seen, give such notice in 1875, and received payment of the amount due after the date fixed in the policy. Within a reasonable

Manhattan Life Insurance Company v. Smith.

time after the notice for 1876 came, in due course of mail, to the hands of one of the payees, a tender of the amount was made to the general agent at Chicago. No such features were disclosed in the *Thompson* case, and they are, as we think, sufficient not only to distinguish the present case from that one, but to authorize the instructions of which the company complains. * * * Judgment affirmed."

Undue importance must not be given to the fact of preparation by the insured for the payment of premiums before leaving home. The date of leaving home is not disclosed, and for aught that appears the preparation may have been made after the 20th of September. At best his tendency was but to show readiness on his part to comply. The fact is not alluded to at all by Justice HARLAN in his comments upon the action of the court below. It will be observed that a point of difference in the two cases is that in the *Riddle* case tender was made; in this case it was not. But it must be kept in mind that a notice which the company's agent sent actually reached one of the beneficiaries the day of his father's death, and he had therefore the information on which to act. Mrs. Smith had no information, and the neglect of the company was the cause of that ignorance. The beneficiary in the *Riddle* policy was apprised of the sum to be paid and that it was due; the beneficiary in the *Smith* policy was kept in ignorance of that sum and of time for payment. There are other questions involved in the *Riddle* case, but they are not believed to at all affect the case before this court.

The action of the company in the case at bar was in effect a repudiation of its promise to pay the amount stipulated in the policy. Even had Mrs. Smith learned the amount and time of payment after the death of her husband, a tender would have been a useless ceremony. "On general principles, whenever the act of one party, to whom another is bound to tender money, services or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from technical performance of his agreement. The law never requires a vain thing to be done." *Iskam v. Greenham*, 1 Handy, 361. See also *Brock v. Huly*, 13 Ohio St. 310. Notice was essential to a forfeiture. The company gave none, and by its course of action waived the forfeiture which might have arisen from non-payment of premium due June 4, 1880, and it is now estopped from setting it up.

We are aware that the views herein expressed as to the effect of failure to give notice are not in accord with a number of reported cases, but they are directly supported by the decision of the highest court in the land, and inferentially by decisions of many other courts, and we believe they rest upon the firm ground of sound principles. There was no error in the instructions given the jury at the trial, nor in the refusals to charge as requested; and an examination of the record discloses no error in the admission or exclusion of testimony prejudicial to the company. It follows that the action of the court at General Term in overruling the motion for new trial and entering judgment on the verdict was not erroneous.

Motion overruled.

JOHNSON, J., did not sit in this case.

MCCELLEAN V. FILSON.

(44 Ohio St. 184.)

Marriage—wife's funeral expenses.

The separate estate of a married woman is liable for the bill of a physician called by her in her last illness and for the funeral expenses.

THE opinion states the case.

Nesbitt & Martin, for plaintiff in error.

Little & Shearer, for defendants in error.

SPEAR, J. The facts shown by the record, so far as they are necessary to an understanding of the points decided, are as follows: Nancy McClellan, a married woman, died about January, 1879, testate, leaving an estate of her own, and a husband surviving her, who also had property. The will named as executor Wm. S. McClellan, a son of the testatrix, who upon the probate of the will, took out letters testamentary, and at once entered upon the discharge of the trust. As such executor he paid from the assets of the estate, as expenses of the last sickness, physicians' bills; also expenses of her funeral, and for a tombstone. The physicians who attended were called by the son (William S.) at request of the mother

McClellan v. Filson.

The coffin and other purchases for the funeral were made by the son. It does not appear that the husband took any action in the way of employing either the physicians or undertaker. The executor also claimed to have paid certain taxes on the lands of deceased during her life, a portion of them more than six years before the death of the testatrix.

To the account of the executor filed in the Probate Court asking credit for all these payments, Mary J. Filson, a daughter of Mrs. McClellan, and legatee under the will, filed exceptions, in which, among other grounds of exception, she urged as to divers items of taxes, that they were barred by the statute of limitations. The Probate Court sustained all the exceptions. On appeal to the Common Pleas by the executor, that court upon trial sustained the exceptions as to the charges for expenses of last sickness and of the funeral, and overruled them as to the tombstone and the charges for taxes. The District Court reversed the judgment of the Common Pleas as to the item of taxes, to which the statute of limitations had been pleaded, and affirmed the judgment of the Common Pleas in all other respects. To reverse this judgment of reversal the present proceeding in error is brought.

We think the executor was justified in paying the funeral expenses and those of the last sickness, and that he should have been allowed for such items in his settlement. The contention is that he was not so justified, because the expenses were a debt against the husband and the executor should have compelled the undertaker to look to him. As to expenses of the funeral, section 6090, Revised Statutes, provides that every executor shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in payment of debts: First. The funeral expenses, those of last sickness, and the expenses of administration. Second. The allowance made to the widow and children for their support for twelve months. Another section permits the executor to sell property of the estate, before letters testamentary are granted, to pay funeral expenses, but for no other purpose. If within the meaning of the statute the funeral expenses are to be considered as debts of the deceased woman there would seem to be reason for regarding the statute as imperative. They manifestly cannot be treated as contract debts, but that as regards the estate of a man, such expenses may be regarded as debts, nevertheless appears to be settled in this State. The statute speaks of them as debts. They are

classed under the same head as the allowance to the widow for a year's support. In the case of *Allen v. Allen*, 18 Ohio St. 234, where the question was directly made, the court sustained the action of the court below, where the allowance was treated as a debt, and held that "the allowance of a sum of money to the widow and child, under section 45 of the Administration Act, is classed among the debts of the deceased to be paid in the order specified in that section." If allowance for a year's support of widow is a debt it follows that funeral expenses are equally so. But as before stated, the debt does not rest upon contract. The inability of a married woman to bind herself by contract generally therefore furnishes no reason why her estate should not be bound. If the statute applies to the estate of a married woman it is bound; if it does not it is not bound. In terms it does apply. The language is, "every executor and administrator shall pay," etc. Unless there is good reason founded upon principle why the married woman's estate should be excepted, then no exception should be made. It is urged that such good reason is found in the fact that at common law there is a duty upon the husband to dispose of the body of his deceased wife by decent sepulture in a suitable place. This is conceded, and it is not intended here to weaken the force of that duty, nor to impair the liability of the husband for the expenses of such burial. But the husband may be without means and unable to procure the services of those whose business it is to bury the dead, though the wife leave an abundance. What shall be done in such case? Shall the body remain unburied? If in such circumstance it is proposed to resort to the wife's estate for such expenses, it must be upon some principle, some rule. What shall it be? We have seen that the law of contract does not aid. She cannot, any more than a deceased husband as to his funeral expenses, be presumed to have contracted. Plainly then it must be by the force of legislation. That we have, and if we apply it in any case to the estate of a deceased married woman, it is difficult to see why, upon principle, it should not be applied to all. If we undertake to make arbitrary exceptions and distinctions, then the rule fails, for if it cannot rest upon the doctrine of a statutory debt, and charge upon the estate, it is not easy to find satisfactory foundation for it. Besides, if the application of the statute be limited to cases where the husband is insolvent, then we impose upon the one who spends time and money upon the con-

McClellan v. Filson.

duct of the funeral the burden of first exhausting the liability of the husband by suit, or at least demonstrating his insolvency. A decent regard for the proprieties of the situation would seem not to require this.

We think the statute was based upon a well recognized necessity, and that such debts may be regarded as created by statute from necessity, and as a charge upon the estate, the same as the necessary expenses of administration, and the statute as furnishing the rule of liability. *Patterson v. Patterson*, 59 N. Y. 574; s. c., 17 Am. Rep. 384. The burial of the dead is a matter of necessity. The public health requires that it be done, and a proper public sentiment equally requires that it be done decently. *Rez v. Stewart*, 12 Ad. & Ell. 773 "The estate in the hands of the executor, is bound by law for the payment of the expenses of the decent interment of the dead." *Hapgood v. Houghton*, 10 Pick. 154. The statute of Massachusetts is similar to that of Ohio, and the court is here speaking of the effect of the statute. It is clear that the expense should be required to be met by any estate which the deceased may leave. Is there any reason for saying that this most reasonable requirement should not apply where the deceased is a married woman? As before stated, we regard the liability as resting on the statute, and upon that wholly. This must have for its basis, in large measure at least, considerations of public policy arising in the necessity of the case. That the dead might have proper sepulture, a clear, easily understood provision as to recompense for the expense was required. That provision we find in the statute. The question then is, do not considerations of public policy apply as well to the case of a married woman as to a man? The necessity in the individual instance may or may not be as great, but where is the difference in principle?

Divers authorities are cited by counsel for defendant in error, but we find none presenting the precise question presented here as to the funeral expenses. *Sears v. Giddey*, 41 Mich. 590; s. c., 32 Am. Rep. 168, is especially relied upon. In that case the surviving husband, with the son of a deceased wife by a former marriage, went together to the undertaker's and there ordered the casket and other goods for the funeral. Nothing was said about payment, or who was to be charged. The charge however was made to the husband, and the credit apparently given to him. The action was by the undertaker against the husband on the account. He sought

to defend, on the ground that the wife had property which she had willed to the son, and therefore he should pay. The court held, and we have no doubt rightly, that the husband must pay. In deciding the case, COOLEY, J., uses this significant language: "A funeral cannot be delayed for judicial inquiries to determine upon whom the moral obligation to proceed with it rests most heavily." In other words the undertaker may conduct the funeral decently and in order, and look to such person as ought to pay for his recompense. In that case it was the husband. In *Gunn v. Samuel*, 33 Ala. 201, an insolvent husband called in the plaintiff, a doctor, to attend his sick wife, her children and slaves. The wife was not consulted and gave no order. During her last illness she requested that a slave be sold to pay the doctor's account. The court held that it being the legal as well as moral duty of the husband to furnish medical attendance for his sick wife, a legal liability rests on him to pay, and her request did not impose an original liability or make her estate responsible, though if she had made a contract originally, express or implied, to pay the doctor, he would be entitled to recover. *Smyley v. Reese*, 53 Ala. 89; s. c., 25 Am. Rep. 598, is perhaps a stronger authority for defendant in error. In that case the husband, as administrator of his deceased wife paid the expenses of her funeral from the assets of the estate and asked to have the amount allowed in settling his accounts, which was refused, the court holding that the statutes of that State "creating the wife's statutory estate do not absolve the husband from his common-law obligation to furnish suitable sepulture for his wife," and that the administrator, in paying the funeral expenses, was but paying his own debt. The question of payment by an executor, not the husband, who has ordered the expenses, is not in that case. A holding contrary to the doctrine of the last case was made in *Gregory v. Lockyer*, 6 Maddock, 90, where the husband having paid the funeral expenses of the wife, and made a claim before the master to have them repaid by the executor from the separate estate of the wife, the separate estate was by decree ordered to be applied in payment.

The question is not simply whether the husband is liable as between him and the undertaker, but may not the estate of the wife also be liable, and may not the executor, having ordered the expense, be justified in paying the claim from that estate? If not, then a woman may die leaving thousands in lands, money and

McClellan v. Filson.

bonds, and if she happen to leave a husband, and he insolvent, the body may lay uncared for until some charitable friend comes to the rescue, or it be taken care of and buried by the town. Public decency and a just regard for an enlightened sentiment forbids.

True, the wife's property may not be taken for the husband's debt. But if the debt may be treated, as we think in this case it may be, as well as that of the wife as of the husband, it would not seem inequitable to allow her estate to bear the burden, though that does serve to exonerate him. At common-law the husband and wife were one, and that one was the husband. Not so now. The common-law right in and power over the wife's property by the husband is almost entirely taken away by our legislation. All estates and property, including rights in action belonging to her at marriage, or which come afterward by conveyance, gift, devise or purchase with her separate money or means or due as wages of her personal labor, or growing out of the violation of her personal rights, together with rents, incomes, issues, and profits, are her separate property. As to the real estate she may rent it for three years, and by will dispose of it entirely at her decease, and the personal estate she may control and dispose of absolutely without the husband's consent. And as to all this separate property she may sue and be sued as if she were unmarried. He has no control whatever over the personal property, except it be reduced to his possession with the express assent of the wife, and mere care, occupancy and use is not to be deemed a reduction to possession unless by the terms of the express assent full authority is given him to dispose of it for his own use. Curtesy initiate, as it existed at common law, is now held not to exist in Ohio, and the right of curtesy is conferred only on surviving husbands in estates of which the wives died seised. It appears plain by this that the relations of the husband and wife as to property have greatly changed in this State by statute, and that much of the reason for the rule that the husband's liability should be held to be so exclusive as to make impossible the subjection of the wife's separate estate to payment of expenses resulting from her necessities has vanished with the change. If the reason for the rule is in large measure gone because of these statutes, we may with some willingness be ready to see the rule, by virtue of other statutes, in equal measure, disappear.

As to the physicians' bills for attendance during last sickness, the record shows that they were incurred by direct procurement of

McClellan v. Wilson.

the deceased. That they were for her benefit admits of no doubt. She had the power to make the same a charge upon her separate estate. And while there are many reasons for saying that such expenses are made by the statute debts against and charges upon the estate of the deceased, in like manner as funeral expenses are, there is the additional consideration that the charge is also made by the deceased herself.

We expressly disclaim any purpose of deciding what is not before us. We hold that under the circumstances the executor had the right to follow the statute; to pay the physicians' bills and the funeral expenses from the estate of the testatrix, and having paid them has now the right to be allowed for such payment.

No question is made here as to the tombstone. The court of Common Pleas approved of that item and ordered it paid. The District Court affirmed the judgment as to that, and there the matter was allowed to rest. Regarding the items of taxes, we find sufficient ground in the record to warrant a reversal of the finding and judgment of the Court of Common Pleas by the District Court irrespective of the question of the statute of limitations, and we express no opinion upon the question raised by the exceptions based upon the statute. The District Court affirmed the judgment below as to all the items of taxes except the first twelve, and no one asks a reversal of that action.

It follows that the judgment of the Court of Common Pleas sustaining the exceptions to the charges for funeral expenses and of last sickness, represented by vouchers one three, four, five and six, and of the District Court affirming such judgment, will be reversed, and the judgment of the District Court as to the items of taxes represented by voucher number ten, in part reversing the judgment of the Common Pleas and in part affirming the same, is affirmed. The Probate Court will be directed to allow to said executor in his settlement the items represented by vouchers one, three, four, five, six, seven, and all items of taxes except the first twelve. The costs of this proceeding in error are adjudged against both parties in equal proportions.

Judgment affirmed.

James v. Allen County.

JAMES V. ALLEN COUNTY.

(44 Ohio St. 228.)

Master and servant — discharge — remedy.

Where a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future installments, but only for breach of contract, and one recovery is a bar. (*See note, p. 828.*)

ACTION for wages. The opinion states the facts. The defendant had judgment below.

Isaiah Pillars and Prophet & Eastman, for plaintiff in error.

Mead & Townsend, for defendant in error.

SPEAR, J. This action is brought to recover for wages claimed to be due from the defendant to the plaintiff upon a contract made December 13, 1881, whereby in consideration that plaintiff would faithfully and diligently serve the defendant as superintendent of the stone and brick work in the construction of a court-house then in process of erection at Lima, until the stone and brick work should be completed, etc., the defendant agreed to employ plaintiff as such superintendent during the period aforesaid, and to pay him for his services at the end of each and every month the sum of \$100. The petition avers that the plaintiff entered upon the employment and discharged the duties thereof until April 6, 1882, when although the stone and brick work was not completed and the plaintiff was and has since been ready and willing to perform all the conditions of said agreement upon his part, the defendant refused to allow him to do so, and to pay him therefor, and discharged him therefrom without any reasonable cause, and has since hitherto refused to employ plaintiff for the remainder of said term. On the 18th day of August, 1882, plaintiff duly requested defendant to pay him his wages due him for his services upon and by reason of said contract for the period of two months from the 13th day of June, 1882, to the 13th day of August, 1882, which defendant refused to do, whereby plaintiff has lost the wages he otherwise would have obtained from said employment from said June 13, 1882, to August 13, 1882, to his damage in the sum of \$200, for which with interest from August 13, 1882, he asks judgment.

The answer of the defendant sets up in bar an alleged former recovery for the same cause of action, between the same parties upon the same contract at the October term, 1882, of the Court of Common Pleas of Allen county, at which term a judgment upon the merits was rendered in favor of the plaintiff for \$205.30. The petition of the plaintiff in the former case is set out and is identical with the petition in the present case except as to time, the pleader averring in the first petition loss of wages from April 13, 1882, to June 13, 1882, and asking to recover for that.

To this answer a demurrer was interposed, which was overruled by the Court of Common Pleas, and judgment entered for defendant, which judgment was affirmed by the District Court. To reverse this judgment of affirmance the present action is prosecuted in this court.

The question presented is whether under such a contract as is here set out, the employee can after being discharged, nothing being due him for wages actually earned, maintain an action for each installment as though earned, upon an allegation of readiness to perform the work; or whether his action is simply one for damages for the employer's breach of contract, and he is limited to one action and one recovery for such damages.

If he can have his option as to these remedies then the cause of action in the first petition was not the same as in the present one, and the former judgment would not be a bar; if he cannot, but is limited to the last-named remedy, to-wit: to damages for breach of the contract, then if both are based upon the same breach, it would follow that they are identical, and that one recovery would necessarily exhaust the plaintiff's remedy, and so the former recovery would be a bar. There is but one dismissal, but one breach pleaded. The dismissal was one act. And as to recovery of damages for that, plaintiff could not split up his cause of action, recovering a part of his damages in one suit and the remainder afterward. He must include all that belonged to that cause of action in his first petition so that one suit and one recovery should settle the rights of the parties. It would be at his own risk and peril if he negligently or ignorantly omitted a part of what might properly have been embraced in the cause of action in his first suit. His mistake, if he made one, might be matter of regret, but that could not change the rule of law.

The contention in support of plaintiff's claim is, that neither ac-

James v. Allen County.

tion was brought to recover damages for breach of contract on the part of the board, but that the plaintiff, having his option, upon being discharged, either to regard the contract as broken by the conduct of the employer and sue immediately for damages for its breach, or treat the contract as subsisting for all purposes and maintain an action for each installment as it became due, chose the latter, and this he might do, because having been discharged without fault on his part, his rights were not lessened, nor was he bound to treat the contract as at an end. Having this choice of remedies, it is insisted, one suit to recover upon installments past due at the commencement of the action, and judgment thereon would not bar a future recovery upon installments coming due thereafter. A contrary view, it is argued, would entail great injustice. Under it the employee would be compelled, unless he were content with such meager damages as he could prove immediately after his discharge, or at most with less than his real loss, to wait until all were due before recovering any thing, and inasmuch as the object in contracting for pay by the month probably was that he might thus support himself and family, they would be left to suffer while waiting for the last installment to become due, and he would thus be driven, in any event, to unreasonable hardships and to a sacrifice of his rights, because of the wrongful act of the employer, a condition of affairs which the law would not justify.

That the doctrine contended for appeals strongly to the feelings, and is not without plausibility, would seem to be apparent from the statement, and that it has met with the favor of courts in several instances, is apparent from an examination of the cases cited by counsel. Still the question remains, does it rest upon solid foundation? The first case in order of time is that of *Gandell v. Pontigny*, 4 Camp. 375, decided at *nisi prius* at Sittings after Hilary term of the King's Bench, in 1816, by Lord ELLENBOROUGH. Plaintiff was clerk for defendant at £200 per year payable quarterly. August 11th defendant discharged plaintiff and paid him for half quarter between 1st July and 15th August. Plaintiff denied the power to discharge and offered next day to continue work, which defendant declined. Lord ELLENBOROUGH's decision is as follows: "If the plaintiff was discharged without sufficient cause, I think this action is maintainable. Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was

therefore indebted to him for work and labor in the sum sought to be recovered."

John Wm. Smith, in his note to *Cutter v. Powell*, 2 Smith Lead. Cas., part 1, says that a servant wrongfully dismissed has his election of three remedies. First, a special action for breach of contract, and this remedy he may pursue at once; second, he may wait until the termination of the period for which he was employed, and then perhaps sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service, and he cites *Gaudell v. Pontigny*.

Two cases are cited from the Supreme Court of New York, where a similar doctrine is held. In *Huntington v. O. & L. C. R. Co.*, 33 How. Pr. 416; s. c., 7 Am. Law Register (N. S.), 143, decided by JAMES, J., the holding is that "where a person employed for a certain time, at a fixed salary, payable monthly, is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due." In the case of *Thompson v. Wood*, 1 Hilton, 96, INGRAHAM, J., says: "Where an agreement of this kind is broken, the person employed has his election, either to sue for his wages as they become due from time to time, or to bring one action for damages for the breach of the contract." This holding that the employee may sue for wages as they become due from time to time was not necessary to a decision of the case, and was apparently based upon the holding of Lord ELLENBOROUGH, before quoted. *Strauss v. Meertief*, 64 Ala. 299; s. c., 38 Am. Rep. 8, is to the same effect. BRICKELL, J., in deciding the case, says: "It is not matter of doubt, that when a contract is made for personal services, for a particular term, at stipulated wages, if the party employed is, without cause, discharged during the term * * * he is not compelled to accept the breach of his employer as a termination of the contract; he may elect to treat it as continuing, and keeping himself in readiness to perform the contract as his part, may recover the wages due on the expiration of the term. And if the wages are payable by installments, he may sue for and recover each installment as it becomes due. Other cases by the same court hold a like doctrine, and it seems to have been accepted by the courts of Mississippi, Missouri, Illinois and Wisconsin.

The decisions in these cases appear to rest upon the doctrine of "constructive service." In several of them it is adopted in words;

James v. Allen County.

in others the principle is assumed without designating it by that title. If that is not their basis it is difficult to see that they have any. The theory of that doctrine seems to be that inasmuch as the employee holds himself ready to do the work, therefore he has done the work; that readiness is, for all purposes, equivalent to performance. For the purpose of allowing a recovery in some amount his readiness to do and tender of performance may have the effect of performance to the extent of putting the employer in the wrong, but how can it be said, in truth, that he has done the work? that he has performed? The claim is based upon a fiction, an untruth. There is no acceptance of the services; there is no delivery of them; the defendant has not had the benefit of them; he has not had value received, and upon what principle is it that in law he is liable for the agreed price when he has not received the commodity which he agreed to buy, and the other party has not parted with the commodity which he agreed to sell? The doctrine of "constructive service," as applied to a case of this character, is one beset with difficulties. It requires a plaintiff to assume that to exist which in fact has no existence. He is demanding wages when he has rendered no service. The doctrine contradicts the very term itself. How can he truthfully aver, as in *indebitatus assumpsit*, that the defendant is indebted to him for work and labor done? Averring it, how could he prove it? But aside from the matter of pleading and proof, in order to recover upon the strength of this doctrine, the employee must not only be willing to perform on his part, but must hold himself in readiness to perform. This implies that he will remain idle. Public policy, not to say public morals, forbids the encouragement of an idle class. Being subject to the universal rule that a person injured by the act of another is bound to use ordinary diligence to make the damage as light as may be, the discharged employee must use ordinary care to obtain employment. He may not be required to seek elsewhere, or to engage in a different industry. But he is bound to use ordinary effort to obtain similar employment in the same vicinity; at least if such employment is offered he is bound to take advantage of it. It would be a direct encouragement to idleness to hold that he who may have, but refuses, similar service, is entitled to full compensation the same as though he performed full labor. This rule stands squarely across the path of "constructive service." For if the workman is bound to accept employment of another employer how

can he continue ready to resume work under his former employer? A learned writer, whose valued paper in support of the doctrine of "constructive service" is cited by counsel, uses this language: "The doctrine of constructive service however does not permit an employee who has been wrongfully discharged to remain willfully idle during the period for which he had been engaged." A most singular conception of the ground work of the doctrine, it seems to us. Being actually at work for B., how can he be constructively at work for A.? Being required to hold himself in readiness to resume his work for A., how can he engage with B.? Engaging with B., how can he be ready to resume work with A.?

"Constructive service," as here sought to be applied, never had, as we think, support in principle, and the support derived from authority is at least very considerably impaired. The case of *Gandell v. Pontigny*, after being followed in several cases in England, was overruled in *Archard v. Hornor*, 3 Car. & P. 349, which was approved in *Smith v. Hayward*, 7 Ad. & Ell. 544, and in the later case of *Goodman v. Pocock*, 15 Ad. & Ell. (N. S.) 576. To like effect will be found *Beckham v. Drake*, 2 H. L. 606, and *Emmens v. Elderton*, 4 H. L. 645. Mr. Smith's second proposition in his notes to *Cutter v. Powell* is expressly disapproved in *Goodman v. Pocock*, ERLE, J., observing: "As to the other option referred to by Mr. Smith, I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service after dismissal. I think the true measure of damages is the loss sustained at the time of the dismissal." And in *Classman v. Lacoste*, 28 E. L. & E. 140, a still later case, Lord CAMPBELL says: "But if the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole gravamen that he suffers by such breach of contract, and that he may receive therein all the damages that may inure to him in consequence." So that it may not be too much to say, that the doctrine of "constructive service" has, in England, where it had its origin, been repudiated, and the law there established that a servant wrongfully discharged has no action for wages unless something is due for past services actually rendered, and as to any other claim on the contract it is for the breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common

law action of *indebitatus assumpsit*. Nor are the cases in New York heretofore referred to now authority in that State. For this see *Moody v. Leverick*, 4 Daly, 401, where the holding is to the effect that a servant wrongfully dismissed cannot wait until the expiration of the period, and then sue for his whole wages on the ground of constructive service, his only remedy being an action for breach of contract of hiring. Also, *Howard v. Daly*, 61 N. Y. 362; s. c., 19 Am. Rep. 285, where *Gandell v. Pontigny*, *Thompson v. Wood*, and the cases in Alabama, Mississippi, Missouri and Wisconsin are distinctly disapproved, and the doctrine of "constructive service" declared to be "so opposed to principle, so clearly hostile to the great mass of authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. * * * The doctrine of constructive service is not only at war with principle, but with the rules of political economy, as it encourages idleness, and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor." The cases of *Chamberlain v. Morgan*, 68 Penn. St. 168; *Willoughby v. Thomas*, 24 Gratt. 522; *Whitaker v. Sandifer*, 1 Duval, 261; *Chamberlin v. McCallister*, 6 Dana, 352, and *Miller v. Goddard*, 34 Me. 102, show that a like view is held by the courts in those States, while Wood's *Mayne on Damages*, 317, 323, and Wood's *Master and Servant*, 246-7, indicate that that author considers the great weight of authority to be in the same direction.

On page 246 of the latter work Mr. Wood uses the following emphatic language: "It (the doctrine of constructive service) was finally exploded, and the doctrine established that a person wrongfully discharged could not, by simply holding himself in readiness to perform his contract, be regarded as having in fact performed it, and thus be entitled to sue for and recover his wages for the entire term, but that he must be restricted in his recovery to the amount of his actual loss. The action in such cases is not for wages, but for damages for breach of the contract. It cannot with any propriety be claimed that an action for wages can be sustained when the servant has in fact rendered no service. Such a doctrine is in defiance of the meaning of the term, and rests upon no solid foundation either in principle or policy." See also an instructive paper by Mr. Thornton, of the Indianapolis bar on this subject, in 8

Southern Law Review, 432, and for a full discussion of the present case, see the able opinion of the judge who presided in the Common Pleas, reported in 9 Week. Law Bull. 186.

To sustain the doctrine of "constructive service" would be in effect to hold that the contract is one which could be enforced specifically, for if after discharge; and after the employer had repudiated the contract on his part and laid himself liable to full damages for its breach, the employee could treat the contract as subsisting in such sort as to recover upon installments as wages earned, when in fact they were not earned, and recover as each came due, the result would be a specific performance of the contract, and that too by a multiplicity of suits. Surely no lawyer would seriously ask a court of equity to specifically enforce a contract, which in its nature gives to the aggrieved party so plain and full a remedy at law in an action for damages.

As a result from the authorities, as well as upon principle, we are satisfied that in such a contract as the one in the case at bar, where the employee is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employee has, whether he bring it at once or wait until the entire period of hire has expired, is one for damages for the breach of the contract, and the measure of damages will be the loss or injury occasioned by that breach, and one recovery upon such claim, whether the damages be denominated loss of wages, or damages for breach, is a bar to a future recovery.

Judgment affirmed.

NOTE BY THE REPORTER. — See *Richardson v. Eagle Machine Works*, 78 Ind. 422; s. c., 41 Am. Rep. 584.

In *Saxonia M. & R. Co. v. Cooke*, 7 Colo. 569, it was said: "When a servant is discharged without a sufficient legal excuse before the expiration of his term, he has his choice of two remedies: he may treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach, or in some cases he may defer suit until the end of the term, and sue for the actual damage he has sustained, which however can in no case exceed the wages for the entire term."

In *Isaacs v. Davies*, 68 Ga. 169, it was held that if a servant be employed for five months at a specified rate per month, payable monthly, and pending the employment be wrongfully discharged, he may in his option sue at the end of each month, and a recovery for one month will be no bar to a suit at the end of the next month. The court said: "Had Isaacs continued Davies in his

Robinson v. Kanawha Valley Bank.

service and failed or refused to pay him at the end of each month, no one would question his liability to suit and judgment. If then he discharged him wrongfully, he did not and could not thereby discharge himself from liability. Isaacs cannot set up his own breach of the contract to discharge himself from its performance."

Howard v. Daly, 61 N. Y. 363; s. c., 19 Am. Rep. 285, was followed in *Weed v. Burt*, 78 N. Y. 192.

The case of *Chamberlin v. Morgan*, 68 Penn. St. 168, does not hold the doctrine of the principal case to which it is cited, but by implication recognizes the opposite.

In *Willoughby v. Thomas*, 24 Gratt. 532, cited in the principal case, it was held that, "if Thomas had been discharged the day after he was employed, without fault on his part, but on the next day obtained as good or better employment for the year, although he would be entitled to a recovery against his employers for breach of contract on their part, he certainly would not be entitled to full wages for the year as the measure of damages," and the doctrine of *Fyrd v. Boyd*, 4 McCord, 246; s. c., 17 Am. Dec. 740, was approved, "that where a planter without cause turns away his overseer at a season of the year when it is impracticable to get employment, the overseer is entitled to the stipulated wages for the whole time." Thus making the remedy dependent on the ability to get other employment.

Chamberlin v. McCallister, 6 Dana, 353, was not a case of master and servant, and monthly or weekly wages, but of a contract for the plastering of several houses, at a certain price per yard, and no payment to be made until completion. *Whitaker v. Sandifer*, 1 Duv. 261, founded on *Chamberlin v. McCallister*, was a contract of service for a year, the wages payable at the end of the year. *Miller v. Gaddard*, 34 Me. 102; s. c., 56 Am. Dec. 638, was a case where the plaintiff voluntarily quit the service, and is not at all in point.

Clearly opposed to the principal case are *Aimfield v. Nash*, 84 Miss. 361; *Garden v. Brewster*, 7 Wis. 355, and *obiter*, *Boose v. Pac. Railroad*, 83 Mo. 212.

ROBINSON V. KANAWHA VALLEY BANK.

(44 Ohio St. 441.)

Negotiable instrument — bill of exchange — acceptance by agent — parol evidence

The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co.," Held, that the acceptance was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him, parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant intended to bind the drawer as his principal, and that this was known to the plaintiff when it acquired the paper.

ACTION on a bill of exchange. The head-note states the case. The plaintiff had judgment below.

Lincoln & Stephens, for plaintiff in error.

W. H. Mackoy, for defendant in error.

MINSHALL, J. It is apparent that the question presented is precisely the same as would have arisen on a demurrer to the answer, and we shall so treat it. Evidence as to the meaning of the initials, without the other circumstances, could in no way vary the rights and liabilities of the parties. If the facts stated in the answer constitute a defense, the defendant should have been permitted to prove the same, as he offered to do by the evidence ruled out. If not, then there was no error in rejecting it, and the judgment should be affirmed.

There is nothing in the answer to the effect, that at the time Robinson accepted the bill, he did not have funds of the drawer in his hands applicable to the payment of the bill at its maturity, or that he did not expect to have, and that this fact was known to the plaintiff when it became the owner of it. It is entirely consistent with the hypothesis that he was acting as the agent of the drawer at Cincinnati, a coal company doing business at Coalburgh, W. Va.; and that in the transaction of its business at Cincinnati, he then had, or expected to have, funds of the company in his hands applicable to the payment of the bill and on which it had been drawn. The relation of principal and agent may exist between drawer and drawee, without changing the rights of the payee against the drawee upon the acceptance of the bill. When the principal, located at one place, draws upon his agent located at another, the natural presumption is, from the usual course of business, that it is against funds of the principal that are, or will be, in the hands of the agent, and which the principal requests the agent to apply to the payment of the bill at its maturity. "A bill of exchange is presumed to be drawn on funds, with the understanding between drawer and drawee that it is an appropriation of the funds of the former in the hands of the latter, and acceptance is an admission that it was so drawn, and of such a relation between the parties." 1 Pars. N. & B. (2d ed.) 323.

The usual relation between the drawee and the drawer is that of debtor and creditor; and such relation in fact exists between an

Robinson v. Kanawha Valley Bank.

agent and his principal, where the latter has funds in the hands of his agent. The bill here, as drawn and accepted, is consistent with and supposes such relation; and as we have observed, there is nothing in the answer to the effect that such relation did not exist, nor was there any evidence offered to the contrary. Robinson was not bound to accept; or he might have done so on condition that he had funds of the principal at the maturity of the bill, and thus have qualified his obligation. But as it is, his acceptance imports the possession of funds, and obliges him to pay the bill. 1 Par. N. & B. (2d ed.) 301, and note (w).

The fact that he is designated in the bill and described in his acceptance as agent does not vary the case. This description of himself may, and no doubt did, serve a useful purpose in the settlement of his accounts with the company.

The law as to notes and bills, executed by persons acting as agents of other persons, is not uniform, but as a rule, where one acting as agent uses words that import a personal agreement on his part, and signs his own name, it is held to be his individual obligation, although he describe himself as agent; the added words being regarded simply as a description of his person. The rule is in conformity to precision in the use of language, and secures that certainty in negotiable paper so necessary to commercial transactions. *Thomas v. Bishop*, 2 Strange, 955; *Barker v. Mec. Fire Ins. Co.*, 3 Wend. 94; s. c., 20 Am. Dec. 664; Dan. Neg. Inst., § 300.

The question has been presented and so ruled in a number of the reported decisions of this court.

Thus in *Titus v. Kyle*, 10 Ohio St. 444, where the makers had described themselves in the body of the note as directors of a certain turnpike road, and the note read, "One year after date, we or either of us, as directors, etc., promise to pay," to which each signed his individual name, it was held that each was individually liable, and that in the absence of an averment of fraud or mistake, the makers could not be permitted to show an intention on their part not to bind themselves individually.

In *Collins v. Buckeye Fire Ins. Co.*, 17 Ohio St. 215, the note read, "I promise to pay, etc.," and was signed "Edward K. Collins, Agent." The defense was that the payee had notice of the agency of the maker, and that he was not liable individually upon the note. But the court held that parol evidence was inadmissible for that purpose, and that Collins was personally liable upon the

Robinson v. Kanawha Valley Bank.

note. These cases show that in this State, where one acting as agent signs his individual name to a note that by its language imports a personal liability on his part, he is bound accordingly although in signing the note he describes himself as agent.

We fail to see how it can make any difference in this respect whether the party signing describes himself as agent simply, or adds the name of his principal; in either case the principle upon which his liability is established and parol testimony excluded must be the same; the instrument upon its face is his own, and not the promise of his principal. To this rule usage has established an apparent exception, in the instances where a bill is drawn or accepted by the cashier of a bank. But it is rather apparent than real, since the custom by which a cashier represents his bank in such matters, by simply signing his own name, is so general that the practice has reduced the custom to the certainty of a law, as it is everywhere understood that in such cases, whether he describes himself as cashier or not, he is an *alter ego* of the bank. His signature is a recognized mode in which a bank may become a party to commercial paper; and the obligation so created is that of the bank and not of the cashier.

There is a marked distinction between this case and those in which the question just discussed usually arises. Ordinarily the principal is some third person, not otherwise related to the bill, but here it is claimed that he is the drawer, and if the acceptance be treated as his, and not that of Robinson, the paper loses its character of a bill of exchange and becomes a promissory note only, and the payee, instead of having a fund appropriated to the payment of his demand or secured by the obligation of an acceptor, is reduced to the personal obligation of the drawer only. This aspect of the case, as unfavorable to the defense, has been commented on, and does not require to be further enlarged.

The cases however to which we have adverted, show that a promissory note signed by an agent, in the manner this acceptance was made, becomes the individual liability of the agent, and would be decisive of this case, though the principal were a third party, unless an acceptance differs in principle from the making of a note, as does an indorsement. It seems that an indorsement may be explained by parol, as pointed out by WELSH, J., in *Collins v. Buckeye Fire Ins. Co.*, 17 Ohio St. 224. The indorsement being a mere transfer of title, the obligation arising outside of it may be changed

Railway Company v. Spangle.

without affecting the indorsement itself. But the obligation of an acceptor is an express one; it is to pay the bill at its maturity according to the order contained in it. The language of the books is that the acceptor of a bill is as the maker of a note, and that when the drawer accepts he comes at once under an absolute obligation to pay the bill according to its tenor. 1 Para. Notes & Bills, § 2, chap. 4. No distinction between a promissory note and an acceptance exists in this regard, and so it has been held that the legal effect of an acceptance, as an absolute contract to pay, cannot be varied by parol. *Heaverin v. Donnell*, 7 S. & M. 244; s. c., 45 Am. Dec. 302; *Adams v. Wordley*, 1 M. & W. 374; *Hoare v. Graham*, 3 Camp. 57; 1 Para. Notes & Bills, 301; *Cummings v. Kent*, 44 Ohio St. 92.

Judgment affirmed.

FOLLETT, J., dissents.

RAILWAY COMPANY V. SPANGLE.

(44 Ohio St. 471.)

Master and servant — agreement to waive liability for negligence.

An agreement by a railway brakeman, at the time of hiring, to waive his right to any action against the employer for negligence of the conductor is void as against public policy. (*See note, p. 836.*)

ACTION for personal injury by negligence. The head-note states the point. The plaintiff had judgment below.

C. H. Scribner, Ashley Paul and C. G. Getzendanner, for plaintiff in error.

Joshua R. Seney, for defendant in error.

OWEN, C. J. Is it competent for a railway company to stipulate with its brakemen, at the time, and as part of their contract of employment, that the company shall not be liable for the negligent acts of its conductors?

Western, etc., R. Co. v. Bishop, 50 Ga. 465, is cited, with other decisions of the same court approving and following it, in support of the affirmative of this proposition. In that case it was held that

Railway Company v. Spangle.

such a contract, so far as it does not waive any criminal neglect of the company, or its principal officers, is a legal contract and binding upon the employee. But MCCAY, J., speaking for the court, says: "We do not say that the employer and employee may make any contract; we simply insist that they stand on the same footing as other people. No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers and doctors, of buyers and sellers, and bailors and bailees, as of employers and employees." This invites us to inquire whether and to what extent the contract we are dealing with is affected by considerations of public policy. It is maintained on behalf of the company that "a rule absolving the company from liability to the brakemen for negligence of the conductor, may operate to constitute the brakemen a sort of police; may induce them to be more watchful, and report to their superiors the delinquencies of the conductor. And if they are unwilling to do this, they, and not the company, should suffer the consequences. A rule of this kind is calculated, also, to better protect the public against injuries to merchandise in course of transportation, by promoting greater diligence and watchfulness on the part of the brakemen employed upon the trains."

Also that "a stipulation which would place additional responsibility upon the employee, and require for his own protection a close observance of the rules of the company, and a strict watch upon the conduct of his immediate superior, would tend to promote the safety of passengers and merchandise in transit."

If this view is tenable, it follows that public policy is concerned in and subserved by such a contract as is here sought to be enforced. As brakeman on the train, Spangler was subject to the orders and control of the conductor.

In *Little Miami Railroad Co. v. Stevens*, 20 Ohio, 415, it was first held, though by a divided court, that a railroad company is liable to an employee for an injury received through the negligence of another employee under whose control he is placed.

This principle was again considered in *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 202, and was applied by a unanimous court to a case like the one at bar, and the railroad company was held liable to a brakeman for an injury resulting to him from the carelessness of a conductor under whose control he had been placed by the company.

Railway Company v. Spangle.

In the course of an able and exhaustive opinion, RANNEY, J., says: "The servants employed to execute cannot recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others must be engaged, and they were jointly bound to perform what was jointly intrusted to them, and public policy may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and equally so, how the safety of travellers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness, that of the company that places him in power. * * * It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. * * * But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

A careful examination of this case and of *Little Miami R. Co. v. Stevens, supra*, which it approves and follows, will make it apparent that the liability of railroad companies for injuries to their servants caused by the carelessness of those who are superior in authority and control over them, is placed chiefly upon considerations of public policy.

The doctrine established by these cases has remained unquestioned by this court for more than thirty years. It furnishes a conclusive answer to the contention of the company that the stipulation which it seeks to enforce would better protect the public by promoting greater diligence on the part of brakemen and the consequent safety of passengers and merchandise in transit.

We are thus relieved of all discussion of the relation which the liability of railroad companies for injuries to their servants caused by the negligence of their superiors in authority sustains to the policy of the State. It is the firmly established policy of our law that

Railway Company v. Spangle.

such liability should attach. It follows that even *Western, etc., R. Co. v. Bishop*, *supra*, which is the strongest authority cited by the company in support of its position, fails to support the view contended for. As we have seen, that case expressly declares that contracts contravening public policy will not be enforced. The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employees, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employees simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements. The trial court was right in refusing the instruction requested.

Judgment affirmed.

NOTE BY THE REPORTER.—To the same effect, *Rosner v. Hermann*, 10 Bim. 486; 8 Fed. Rep. 782, where the question was passed upon orally, without consideration; and see *Kans. Pac. Ry. Co. v. Peasey*, 29 Kans. 169; s. c., 44 Am. Rep. 630.

To the contrary is *Griffiths v. Earl Dudley*, 9 Q. B. Div. 357, under the Employers Liability Act; s. c., 44 Am. Rep. 633, note.

In *Western, etc., R. Co. v. Bishop*, 50 Ga. 465, the court said: "Labor is property, and the laborer has, and ought to have, the same right to contract in reference to it as other persons have in reference to their property. Generally the duties cast by law upon employer and employee are only implications of law; in the absence of stipulations by the parties, it would be a dangerous interference with private rights to undertake to fix by law the terms upon which employer and employee shall contract. For myself, I do not hesitate to say that I know of no right more precious, and which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same law-giver which claims to make a contract for them on one point, may claim to do so upon others, and thus step by step they cease to be free men. We do not say that employer and employee may make any contract; we simply insist that they stand on the same footing as other people. Will it for a moment be insisted that one who borrows a horse may not stipulate that he shall exercise only the care cast by law upon one who hires a horse? May not a warehouseman stipulate that he will take extraordinary care, when the law, in the absence of such a stipulation, would cast upon him only ordinary care? May he not even stipulate that all the risk shall be upon the bailor?" In this

Railway Company v. Spangle.

case however it was held that the employee might not waive liability for criminal neglect.

In *Little Rock & Ft. S. R. Co. v. Hubanks*, Arkansas Supreme Court, March 12, 1887, it was held that an agreement entered into by one with a railroad company upon being employed as brakeman, to take upon himself all risks incident to his position on the road, and not to hold the railroad company liable for any injury he may sustain by accident or collision on the trains of the road, or by defective machinery, or carelessness, or misconduct of himself or any other employee of the company, is not binding on him. The court said: "In 1880 the English parliament passed the 'employers' liability act,' the object of which was to make employers liable for injuries to workmen caused by the negligence of those having the supervision and control of them. In *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, it was held that a workman might contract himself and his representatives out of the benefits of this act. An opposite conclusion has been reached by the Supreme Courts of Ohio and Kansas. They hold that it is not competent for a railroad company to stipulate with its employees at the time of hiring them and as part of the contract, that it shall not be liable for injuries caused by the carelessness of other employees. *Lake Shore & M. S. R. Co. v. Spangle*, 44 Ohio St. 471; *Kansas Pac. R. Co. v. Peasey*, 29 Kans. 169; s. c., 44 Am. Rep. 630; s. c., 11 Am. & Eng. R. Cas. 200. In the notes to the last-mentioned case, as reported in the two series of reports last cited, the substance of *Griffiths v. Earl of Dudley* is set out. This however is not precisely the same question we have to deal with, for the negligence of a fellow-servant is not in fact and in morals the negligence of the master, although by virtue of a statute it may be imputed to the master. It is impossible for the master always to be present and control the actions of his servants. Hence a stipulation not to be answerable for their negligence beyond the selection of competent servants in the first instance, and the discharge of such as prove to be reckless or incompetent, might be upheld as reasonable, notwithstanding a statute might abolish the old rule of non-liability for the acts and omissions of a co-servant. But the Supreme Court of Georgia have in several cases sustained contracts like the one before us as legal and binding upon the employee, so far as it does not waive any criminal neglect of the employer. The effect of these decisions is that the servant of the railroad company, for instance, not only takes upon himself the incidental risks of the service, but he may by previous contract release the company from its duty to furnish him a safe track, safe cars, machinery and materials, and suitable tools to work with. *Western & A. R. Co. v. Bishop*, 50 Ga. 405; *Western & A. R. Co. v. Strong*, 52 Ga. 401; *Galloway v. Western & A. P. R. Co.*, 57 Ga. 512. On the other hand, in *Rosenor v. Hermann*, 10 Biss. 486; 8 Fed. Rep. 782, a contract by a master against his own negligence was declared to be void as against public policy, GRISHAM, J., saying: 'If there was no negligence the defendant needed no contract to exempt him from liability; if he was negligent the contract set out in his answer will be of no avail.' Compare *Memphis & C. R. Co. v. Jones*, 2 Head, 517, where it was decided that such a contract would not protect the master against gross negligence. It is an elementary principle in the law of contracts that '*modus et conventio vincunt*

Railway Company v. Spangle.

legum — the form of agreement and the convention of parties override the law. But the maxim is not of universal application. Parties are permitted by contract to make a law for themselves only in cases where their agreements do not violate the express provisions of any law, nor injuriously affect the interests of the public. Broom Leg. Max. *543; *Kneetle v. Newcomb*, 23 N. Y. 249. Our Constitution and laws provide that all railroads operated in this State shall be responsible for all damages to persons and property done by the running of trains. Const. 1874, art. 17, § 12; Mansf. Dig., § 5537. This means that they shall be responsible only in cases where they have been guilty of some negligence; and it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy. The law requires the master to furnish his servant with a reasonably safe place to work in, and with sound and suitable tools and appliances to do his work. If he can supply an unsafe machine or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutary rule. In the English case above cited it is said this is not against public policy, because it does not affect all society, but only the interest of the employed. But surely the State has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community; and it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railroad company, and every owner of a factory, mill or mine, would make it a condition precedent to the employment of labor that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous even when well managed; and the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity."

Mr. Greenhood (Pub. Pol. 528), adopts the rule of *Roesner v. Hermann*, *supra*. He notices the *Bishop* case but not the *Griffiths* case. But we think the doctrine of the principle case unsupportable in principle and opposed to the best authority. We agree with the *Solicitors' Journal*, which pronounces the decision in *Griffiths v. Earl Dudley*, "quite unquestionable." As FIELD, J., suggests in that case, such a contract is not subject to any considerations of public policy; it does not concern the public. What have the public to do with the negligence of a railroad conductor which affects only a brakeman? In most of the States there would be no need of such a contract, because the railroad company would not in any event be liable for the neglect of the conductor toward the brakeman.

Castle v. Rickly.

CASTLE V. RICKLY.

(44 Ohio St. 490.)

Negotiable instrument — indorser after negotiation.

A stranger to a note, who indorses it after its inception, to give the payee credit with a proposed purchaser, is liable as a guarantor, without protest and notice.

ACTION on promissory notes. The opinion states the case. The plaintiff had judgment below.

J. T. Holmes, for plaintiff in error.

E. L. De Witt, for defendants in error.

DICKMAN, J. On the 18th day of November, 1872, George W. Griffith, for value received, made his two promissory notes of that date, for \$150, each, to Jacob Matheny or order, payable respectively in three and four years after date, with interest from date, payable annually. Both notes bore the indorsement: "Protest waived. J. S. Matheny, G. F. Castle." Matheny and Castle, the plaintiff in error, purchased a house and lot in Columbus, Ohio, of Samuel S. Rickly, one of the defendants in error, and these notes were transferred to him as part of the purchase-money. Upon non-payment of the notes by the maker at maturity, an action was brought by Rickly on each note against Griffith, Matheny and Castle, in the Court of Common Pleas for Franklin county, but the two cases were consolidated, and Griffith and Matheny being in default for demurrer or answer, the case as consolidated was tried on the issues made by an amended petition and the answer of Castle thereto. The notes were taken by Rickly several days after they were executed and delivered to the payee, to-wit, about December 10, 1872. Although the payee had indorsed them, Rickly, before taking them, required for additional security, that Castle should also put his name on the back thereof. Castle accordingly, and before the notes had matured, signed his name thereon under that of the payee; the notes were then delivered to Rickly, and the real estate transaction was consummated. On the trial in the Common Pleas, evidence was offered by the defendant tending to show that the words "protest waived" were put on the

Castle v. Rickly.

notes by Matheny, some considerable time after their delivery to Rickly as part payment for the real estate, and that Castle had no knowledge thereof until after the original action was brought.

Among other things, the court charged the jury as follows:

1st. "The instruments sued on in this action are not foreign notes, but are inland notes, * * * but it was necessary, at maturity, to demand payment of the maker, and on his failure to promptly pay the same, to give immediate notice of such demand and dishonor to the indorsers, unless demand and notice of such non-payment had been waived."

2d. "But whether he" (the defendant Castle) "was indorser or guarantor, the nature of his undertaking was such that he was entitled to have notice of demand and non-payment of said notes; the same as if he was a mere indorser; and if no such notice was given to him, the plaintiff cannot recover, unless you should find, from the evidence, that the words 'protest waived' were on said notes at the time the said Castle indorsed them, or that they were subsequently placed there by his authority."

But the court refused to give the following charge to the jury, as requested by the plaintiff, to-wit:

"If you should find, from the evidence, that the said Castle did not indorse said notes, by writing his name on the back thereof, under the words 'protest waived,' or at the same time, and as part of the same transaction, he did not write, or there was not written over his name the words 'protest waived;' yet if you should find, from the evidence, that the said Castle indorsed said notes, by writing his name upon the back thereof, in blank, after the execution of said notes, and that the said Castle was not an original party to the notes, but a stranger, this would constitute an absolute and unconditioned guaranty of said notes by the said Castle; and the said Castle, having made no defense to said guaranty, he would be liable, as guarantor of said notes, without notice to him of demand and non-payment, or protest, and your verdict must then be for the plaintiff, finding the amount due the plaintiff from said defendant, Castle, on said notes."

To which charge and refusal to charge, the plaintiff at the time excepted. A verdict was returned in favor of Castle. A motion for a new trial being overruled, judgment was entered on the verdict, and a bill of exceptions, embodying all the evidence adduced on the trial, was allowed and made part of the record. The Dis-

Castle v. Rickly.

strict Court reversed the judgment of the Common Pleas, for error in its charge, and refusal to charge the jury as requested, and remanded the cause for a new trial. This proceeding is instituted to reverse the judgment of the District Court.

It is not claimed that the plaintiff in error ever had notice of any demand of payment on the maker of the paper in question and of its dishonor. The jury was doubtless satisfied that Castle had not expressly waived demand and notice; that he had not adopted the words of waiver put on the note by Matheny. From the charge of the court and its refusal to charge as requested, the jury could not but find that Castle had the rights of an indorser, and was entitled to have notice of demand and non-payment of the notes, and that the plaintiff upon his failure to give such notice could not recover. The question therefore arises, whether Castle is to be regarded as an indorser of negotiable paper, with the liabilities and rights incident to such an engagement, or a guarantor, whose guaranty was of such nature as to render it unnecessary to prove either demand or notice in order to make out a *prima facie* case for recovery.

We are of opinion that the plaintiff in error was such a guarantor. It was held in *Champion v. Griffith*, 13 Ohio, 228, and afterward approved in *Robinson v. Abell*, 17 Ohio, 36, that the mere indorsement upon a note of a stranger's name in blank is *prima facie* evidence of guaranty, there being no proof that his indorsement was made at the time of the making of the note. This presumption, it is true, may be overcome by parol evidence that a different agreement was intended. *Oldham v. Brown*, 28 Ohio St. 52; *Kelley v. Few*, 18 Ohio, 441; *Bright v. Carpenter*, 9 Ohio, 139; s. c., 34 Am. Dec. 432; *Champion v. Griffith*, *supra*; *Robinson v. Abell*, *supra*. But the evidence, as disclosed by the record, shows that Castle's name was not put upon the notes at the time of their execution or before they were drawn, and so he could not be charged as an original promisor. He was a stranger to the paper, his name not being thereon at the time it was first offered to Rickley in part payment for the real estate. Not then being in the chain of title, leaving no ownership in the notes, he could not, in the capacity of indorser, vest title thereto in an indorsee. Matheny, the payee, was at the time in possession of and the sole owner of the notes, and was the only person competent as an indorser to enter into the contract implied in the act of indorsement, namely, that he had a good title

Castle v. Rickly.

to the instruments. As an indorser, he did not transfer the paper to Castle, who might in turn indorse it to pass title, but Matheny by indorsement vested title directly in Rickly, with no indorsee intervening. Rickly however demanded other security than a recourse to those who were parties to the paper, and therefore required that Castle, a stranger to the paper, should place his name upon its back, and thus add strength and credit to it, and render it more easy of circulation. Castle, in signing his name under that of the payee and indorser, assumed the obligation of a guarantor, and did not contract to pay the notes if dishonored, only upon condition that they would be duly presented for payment at maturity, and due notice would be given to him of the dishonor. The rule as laid down by Judge STORY is that if subsequently to the time when the note is made a party indorses it, not being a regular indorsee from or under any of the antecedent parties, he will be deemed a guarantor, if there be a sufficient consideration. Story Prom. Notes, § 133.

The guaranty of the plaintiff in error was not dependent on any condition or contingency expressed in or implied from the terms of his contract. In legal effect, it was as absolute and unconditional as if he had written on the back of each note, "I guarantee the payment of the within note"—words held in *Clay v. Edgerton*, 19 Ohio St. 549, to be an absolute and unconditional guaranty and which rendered it unnecessary to aver or prove either demand or notice, in order to make out a *prima facie* case for recovery. As said in *Neil v. Trustees, etc.*, 31 Ohio St. 15, "a breach of the agreement of the guarantor results from the nonpayment of the debt." There being no condition, as regards presentment or notice, implied in the terms of such a guaranty, the guarantor must inquire of his principal, or take notice of his default, at his peril. By such a guaranty, the guarantor is not made a party to the note, and his contract, unlike that of an indorser, is governed by the rules of the common law, and not by those peculiar to the law merchant. "It is an undertaking to do a certain thing in a certain specific event. The event is a default in the payment of the bill or note by the parties. When this happens, the liability of the guarantor, by the terms of his guaranty, is complete." Story Prom. Notes (7th ed.), 623, note by Thorndike. In accordance with the foregoing considerations, we are of opinion that the judgment of the District Court should be affirmed.

Judgment accordingly.

CHASE V. CITY OF CLEVELAND

(44 Ohio St. 504.)

Municipal corporation — icy sidewalk

A city is not liable for an injury sustained by a traveller by a fall upon a level sidewalk by reason of smooth ice, it not appearing that it was at a greatly frequented place.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

Mix, Noble & White, for plaintiff in error.

Allen T. Brinsmade, for defendant in error.

SPEAR, J. It will be noticed that there is no allegation in this petition that the walk was itself defective. No improper construction is charged, nor is it alleged that the walk was in such condition as to be peculiarly liable to cause the formation of ice; nor was the ice rough or uneven. The place where the accident occurred does not even appear to have been upon a slope or incline. So far as the charge of negligence on the part of the defendant is concerned the gravamen of the complaint is: 1. The defendant is a city of the first class; 2. Wood street is a street within the corporate limits; 3. For a number of days next preceding the accident the city had carelessly and negligently suffered ice and frozen snow to accumulate on the sidewalk in front of the property of a private owner, so as to become dangerous for persons passing along the same, having been beaten smooth and slippery, so that children had made a slide there, which had been there for some days previous, of all which defendant had or might have informed itself in time to have made the walk safe before the occurrence. Putting this charge in fewer words, it appears that the defendant is a city of the first class. Wood street is one of the public highways. On a sidewalk of this street, in front of private property, the city suffered ice and frozen snow to accumulate, and for a number of days to be beaten smooth and slippery, and for that reason to become and remain dangerous.

* Same effect, *Grossenbach v. City of Milwaukee* (65 Wis. 81), 56 Am. Rep. 614.

Chase v. City of Cleveland.

Of this condition of the walk the city might have informed itself in time enough to have made it safe before the accident.

Is this a sufficient charge of negligence? To show negligence it must be made to appear (1) that the city had notice, actual or constructive, of the dangerous condition of the walk in time to remedy it, and (2) that having such notice, it was the city's duty to remedy it.

As to the first: For all that appears Wood street may be a street lying on the outer limits of the corporation. It may be a street but little improved, but little used, and but little frequented by the general public.

If therefore as to every part of every public highway within the municipality it was the duty of the city to take unusual means and use extraordinary care to keep itself advised of the condition of the walks, then such duty attached to this part of Wood street; otherwise not. We say extraordinary care, because the allegation that the city "had or might have informed itself," etc., means only that it might have informed itself, which is another form of saying that it was possible to have obtained the information.

The terms "a number of days" and "some days" may mean two days or more. Neither necessarily indicates a greater number than two. Now as to the most public and frequented streets, it may be that the allegation that the accumulations were there a number of days, or some days, is sufficient to cause notice to the city to be presumed, but this would not necessarily be so as to out-of-the-way streets and those remote from business centers. It would be improbable that any city official who owed any duty in that regard would pass in the time stated under such circumstances as to make it incumbent on him to observe the condition of the walk, or that the proper city authorities would be informed of its condition from other sources. The allegations referred to are therefore clearly insufficient to show notice to the city. So that the plaintiff is remitted, as to this essential element, to the allegation that it was possible for the city to have obtained the information. We do not understand that a city is bound at all hazards to have knowledge of defects in sidewalks. Municipal corporations are not insurers of the safety of their public ways, or of the lives and limbs of pedestrians. The law provides that such corporations shall have the care, supervision, and control of the streets, and shall cause

Chase v. City of Cleveland.

them to be kept open and in repair, and free from nuisance. This requires a reasonable vigilance, in view of all the surroundings, and does not exact that which is impracticable. When the authorities have done that which is reasonable in this regard they have discharged the entire obligation imposed by the law. They are not bound to use all possible vigilance in inspection or in obtaining information.

This view, if correct, disposes of the case; but, waiving this, is the petition free from infirmity in other respects? The city is bound to exercise due care to keep the streets and walks reasonably and relatively safe, but cannot be required to make all streets and walks absolutely safe or equally so. The complaint is that the walk was dangerous by reason of accumulations of ice and frozen snow, which rendered it slippery. The result was due in part to the elements and in part to the beating down of the ice and snow, especially by children sliding on it. If then the city of Cleveland, as to all the sidewalks within the corporate limits, is liable for accidents which occur by reason of slippery sidewalks, of the condition of which it has notice, then were notice shown here it would be liable to the plaintiff in this case. It is insisted that there is such liability. If this be the law, an onerous burden is cast upon many of our municipal corporations. In all northern cities and towns storms of snow and sleet, producing ice and resulting in slippery walks, are of frequent and constant recurrence during the winter season, and accidents of the character complained of are also frequent. Such dangers are apt to exist in many places at the same time, and at points widely separated from one another. They appear at many points to-day, disappear to-morrow, and like dangers appear at other places the next day. They are effected by changes of weather, which are likely to occur at any time, and frequently many times within a few hours. It is not unreasonable to assume that there were hundreds of similar dangerous places in the city of Cleveland at the time of the accident to plaintiff. To effectually provide against dangers from this source would require a large special force involving enormous expense; for to make the protection effective, constant activity and vigilance would be required as well in the ascertainment of the dangers as in their removal upon being known.

Such duties do not naturally fall within the province of the police force, as that force is not a city agency for any such purpose. It

would be possible to employ and pay a special force, but it does not follow that it would be reasonable to require it.

Regarding the removal of dangers as well as regarding watchfulness in ascertaining their existence, the municipality is bound to exercise only ordinary care; to take such measures as are reasonably to be required and adequate in view of the ordinary exigencies.

The condition of the walk in this case is not complained of as a defect in the sidewalk, but rather an accumulation on it which created a nuisance. This was transient in its character, and not such as to ordinarily require the interference of the city authorities for its abatement. Those authorities are empowered to clear the streets from snow and filth, and by ordinance, to require property-owners to keep the walks cleared from snow and ice, but ordinarily liability does not attach for a failure to do so. Slipperiness may arise from a variety of causes. A thin film of mud on the walk will often produce it, and yet liability would hardly be claimed to arise from such cause. It is not clear, on principle, that an exception should necessarily be made in regard to slipperiness from accumulations of ice.

We have considered the numerous authorities referred to by counsel in the able and elaborate printed brief, and have read the argument with much pleasure. It invites to an extended discussion of the subject and a review of the authorities. We doubt whether good would result from extended discussion, or from an attempt to weigh the arguments in the conflicting decisions of other States, or even from a lengthy review of those decisions, and hence do not enter upon either, but are content to rest this branch of the case as to the duty of the city regarding removal of ice from the sidewalks within the municipality, on the ground tersely put in substance by counsel for defendant, that the law exacts of municipalities only that which is practicable and reasonable in regard to keeping streets open, in repair, and free from nuisance; that the duty of the municipality, under the statute, must be interpreted upon a reasonable basis in reference to the actual condition of affairs; that impracticable things are not required, and that to hold the city liable, under the allegations of this petition, would be to require that which is impracticable, and to impose an onerous and unreasonable burden upon it.

Whether or not a case might be made, growing out of a peculiar

Chase v. City of Cleveland.

situation of a walk at a greatly frequented place upon one of the most public streets wherein the city might be held for damages arising from slipperiness of ice alone, we need not here consider. Such a case has not been made.

The petition does not state a cause of action, and the judgment of the Court of Common Pleas is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

ANNAS V. MILWAUKEE AND NORTHERN RAILROAD COMPANY.

(67 Wis. 46.)

Carrier — railroad — free pass — limitation of liability.

SUFFICIENTLY reported, 57 Am. Rep. 388.

BURSINGER V. BANK OF WATERTOWN.

(67 Wis. 75.)

Insurance — life — assignment — interest.

A policy on one's own life, the premiums having been fully or nearly paid up, may be effectually assigned by him to any person having no insurable interest in his life. (*See note, p. 852.*)

An assignment by a son of an insurance policy on his own life as security for a debt from his father to the assignee is valid.*

ACTION on a life insurance policy. The head-note states the points. The defendant had judgment below.

George W. Bird, for appellant.

*See *Elkhart Mut. Aid, etc., Assn. v. Houghton* (103 Ind. 286), 53 Am. Rep. 514

*Bussinger v. Bank of Watertown.**Harlow Pease, for respondent.*

TAYLOR, J. [Omitting other points.] But the learned counsel for the appellant contends that the assignments in this case are void at law, because assigned to a party who had no insurable interest in his life, and therefore independent of the question of his incapacity to make the assignments on account of his drunkenness, he is entitled to recover upon that ground. As there must be a new trial in the case where this point may be pressed upon the Circuit Court, and the point having been fully argued on this appeal, we feel called upon to give our opinion upon that question.

We think this question has been decided against the appellant by this court in the following cases cited by the respondent: *Archibald v. Mut. Life Ins. Co.*, 38 Wis. 542; *Clark v. Durand*, 12 Wis. 223; *Kernan v. Howard*, 23 Wis. 108; *Foster v. Gile*, 50 Wis. 603. There being no question but that the policy was originally obtained for the benefit of a person having an insurable interest in the life of the assured, the policy being upon the life of the assured himself, that the owner of such policy may thereafter lawfully assign the same to any person, with the assent of the insurance company, is sustained by the great weight of authority, and as we think by sound principles of law. See the following authorities: *St. John v. Am. Mut. L. Ins. Co.*, 13 N. Y. 31; *Valton v. Nat. F. L. Ass. Co.*, 20 N. Y. 32; *Olmsted v. Keyes*, 85 N. Y. 593; *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 294, 302; *Fairchild v. N. E. Mut. L. Ass'n*, 51 Vt. 625; *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496; *Ashley v. Ashley*, 3 Sim. 149; *Mut. L. Ins. Co. v. Allen*, 138 Mass. 24; *Harrison v. McConkey*, 1 Md. Ch. 34; *Angell Fire Ins.*, § 325; *Langdon v. Union Mut. L. Ins. Co.*, 22 Am. Law Reg. 385; *Campbell v. N. E. Mut. L. Ins. Co.*, 98 Mass. 381; *Palmer v. Merrill*, 6 Cush. 282; s. c., 52 Am. Dec. 782.

The only case cited by the learned counsel for the appellant which really holds a different doctrine is *Mo. Valley Ins. Co. v. Sturges*, 18 Kans. 93; s. c., 26 Am. Rep. 761. The case of *Franklin Mut. Ins. Co. v. Hazzard*, 41 Ind. 116; s. c., 13 Am. Rep. 813, was a case where the assured, after paying two annual premiums, announced to the company that he should not keep up the policy, and he declined to pay a premium then past due. Shortly afterward he assigned the policy to Hazzard for the sum of \$20. The premium paid by the assured was \$62.40. The court say: "The

question arises whether a person can purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no insurable interest." It might well be said that the purchase of the policy in this case, after the holder determined not to continue it, was equivalent to taking out an original policy on the life of the assured.

All the cases cited by the learned counsel in the courts of the United States were cases where it was evident the original policies were taken out for the benefit of the persons to whom they were immediately assigned, and who in fact paid the premiums on the policy from the beginning. Taking out the policies in the names of the assignors in those cases was clearly a cover for acquiring a wager policy on the life of a person in whom the person really insured had no insurable interest. The language of the learned justice of the Supreme Court of the United States who wrote the opinion in the case of *Warnock v. Davis*, 104 U. S. 775, when considered in the light of the facts of the case, does not conflict with the rule laid down by this court and the courts above mentioned.

Whatever objection there might be to allowing the assignment of a life policy, upon which the future premiums are to be paid, during the life of the assured, no such objection can be fairly raised against the assignment of a policy upon which all the premiums have been paid, and the payment of the amount due is alone dependent on the death of the assured, nor to the assignment of an endowment policy where nearly all the payments have been made.

It is not an established rule of law that every contract is void which gives the party to it a pecuniary interest in the death of the other party or of a third person. If that were the law, then every conveyance, will or other instrument, which conveyed to another an estate in reversion, would be void, as the reversioneer is certainly interested in the speedy demise of the person owning the life estate. There would seem to be no greater reason for holding void a sale or assignment of a life insurance policy which has been obtained in good faith by the holder, to a third person, with an agreement on his part to pay the future premiums and receive the insurance money on the death of the assured, than there would be for holding that a person who held a life estate in real property could not lease such estate for the term of his life to the reversioners, upon the payment of a stipulated annual rent to be paid to

the party having the life estate. In that case, the party taking the life lease would have just as much interest in the speedy death of the holder of the life estate as the purchaser of an insurance policy upon which annual premiums are to become due has in the death of the assured.

The mere fact that a person who becomes the purchaser of a life policy may thereby become interested in the speedy death of the person to whom the policy is issued, can be no legal ground for holding such purchase void. In all the decided cases where such assignments have been held void, there has also existed the fact that the assignee or purchaser has taken the policy, not in good faith, paying the value thereof, but as a speculation upon the life of the party in whom he has no interest, and so the transaction has been brought within the rule against wagering policies. Nor are we able to perceive why the holder of a valid policy should be prevented from realizing the value of the same to him, before his death, by a *bona fide* sale or assignment thereof. Such sale or assignment may, in fact, be absolutely necessary in order to get any benefit of his policy. The holder may have paid thousands of dollars in premiums, through a long series of years, and a time may come when he becomes unable to pay the premiums to become due, and he must either sell his interest in the policy, or suffer it to lapse and lose all the premiums paid. Under such circumstances, can there be any thing against public policy or the law which will prevent the unfortunate holder of the policy from selling the same for the best price he can, and so get some benefit of his previous payments? We think not. The only reason for holding such sale void is because it gives the purchaser a pecuniary interest in his speedy death, and as we have seen above, that fact alone has never been held sufficient to render a contract void. So far from this fact being a cause for holding the contract void, the law of this State expressly sanctions the issuing of wager policies for the benefit of a married woman, and thus, in all such cases, gives a pecuniary interest in the speedy death of the person so insured for her benefit. See § 2347, R. S. 1878.

But there is another ground upon which the assignment of the policies in this case can, we think, be upheld in case the plaintiff was at the time competent to make them, viz., the person for whose benefit in part they were made had an insurable interest in the life of the plaintiff. The evidence shows that the assignments

Buminger v. Bank of Watertown.

were made as security for a debt due from the father of the assured to the bank, and so was for the benefit of the father as well as of the bank. That the son has an insurable interest in his father, and the father in the son, would seem to be supported by the authorities. See *Etna L. Ins. Co. v. France*, 94 U. S. 561; *Loomis v. Eagle H. & L. Ins. Co.*, 6 Gray, 399; *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249; *Reserve Mut. Ins. Co. v. Kane*, 81 Penn. St. 154; *Warnock v. Davis*, 104 U. S. 775; May on Ins., § 107, p. 113, and cases cited; *Williams v. Wash. L. Ins. Co.*, 31 Iowa, 541; *Mitchell v. Union L. Ins. Co.*, 45 Me. 104; *Hoyt v. N. Y. Life Ins. Co.*, 3 Besw. 440.

It is held in the case of *Etna L. Ins. Co. v. France*, *supra*, that the relationship of the parties divests the policy of those dangerous tendencies which render these policies contrary to good morals; and in the Pennsylvania case it was held that a statutory provision requiring the father to support the son, and the son the father, in case either required the support of the other, was a sufficient interest to support a life policy.

For the reason that the record discloses the fact that the plaintiff produced evidence on the trial tending to show that he was incompetent, on account of intoxication, to make the assignments in question at the time they were made, it was error for the Circuit Court to nonsuit the plaintiff, and for that error the judgment must be reversed.

By the Court. The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

NOTE BY THE REPEATER.—See *contra*, *Helmig's Adm'r v. Miller*, 76 Ala. 183; s. c., 52 Am. Rep. 316; see note, 52 Am. Rep. 185.

In *Bloomington Mut. Life Ben. Ass'n v. Blue*, Illinois Supreme Court, March 23, 1887, it was held that a person may, of his own accord, insure his own life, pay the premiums himself, and make the policy payable upon his death to a third party who has no insurable interest in his life. The court said: "It may be regarded as a plain proposition of law that a wagering policy is void, and we think it also well settled that a policy taken out on the life of a third party by a beneficiary, in the continuance of whose life the beneficiary has no pecuniary interest, may be regarded as a wagering policy, and as such would be void. Had this policy been taken out by Blue on the life of Bailey, without his knowledge or consent, and had the premiums been paid by him it would manifestly fall within what is known as a wagering policy, and would be void. Public policy forbids one person, who has no interest in the continuance of the

Bursinger v. Bank of Watertown.

life of another, from speculating on that life by procuring a policy of insurance. But here it does not appear that Blue had any instrumentality whatever in procuring the policy on the life of Bailey, or that he ever paid any portion of the premiums to procure the policy, or to keep it in force, and hence the case of *Ins. Co. v. Hogan*, 80 Ill. 39, cited by the defendant, has no bearing on this case. In the case cited the insurance was procured by the beneficiary, and all the premiums were paid by him; while here Bailey procured the policy, and paid all the premiums. Manifestly the *Hogan* case can have no bearing on the facts of this case. Bailey had an insurable interest in his own life; and had a clear right to procure a policy on his life; and unless some principle of public policy is violated, he could make it payable in case of death, to any person whom he might desire. In *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 294, where a similar question arose, it is said: 'A question was made before us that Miss Lemon had not an insurable interest in Mr. Peterson's life.' If she had undertaken to obtain, and had herself obtained an insurance on his life, that question might have arisen; but surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it, and we know of no law to prevent him making it payable, in case of his death, to the person to whom he was affianced; and if such a policy is delivered as a gift to the party to whom payable, we know of no law to prevent such a gift from being effectual. In *Rawls v. Life Ins. Co.*, 27 N. Y. 282, Judge Wright says: 'If the contract is with the party whose life is insured he may have the loss payable to his own representative, or to his assignee or appointee.' In *Fairchild v. North-eastern M. L. Ass'n*, 51 Vt. 613, it is said: 'The second point made by defendant is that Fairchild had no insurable interest in the life of Mrs. Nay, and that the policy is therefore a wagering contract, and void by the law of the State. * * * If it were shown therefore that in point of fact Fairchild procured this policy to be issued upon the life of Mrs. Nay himself, and for his own benefit, the question of his insurable interest might arise. But the *prima facie* showing of the policy, application and receipts, is that Mrs. Nay procured the policy to be issued herself upon her own life, and chose to make Fairchild the beneficiary. * * * We are bound to presume that the policy was procured by Mrs. Nay upon her own life, as is the purpose of the instrument itself. * * * 'It cannot be questioned,' says the Supreme Court of Indiana, 'that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money, in case of his death, during the existence of the policy; and he may effectuate this object by an assignment of the policy, or by immediately appointing such person as the beneficiary. * * * It is the interest of A. in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by the agreement of the parties to receive the proceeds of policy upon the death of the assured.' In *Langdon v. Un. M. L. Ins. Co.*, 14 Fed. Rep. 272, it is said: 'There is no case to my knowledge which holds that a party may not insure his own life, and make the policy payable to any one he may select, though such person has no legal interest in his life. * * * Although this exact question has not been decided, the intimations of the courts are uni-

Bursinger v. Bank of Watertown.

formly in that direction.' In *Connecticut M. L. Ins. Co. v. Schaffer*, 94 U. S. 457, it is said: 'There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend, or two or more persons on their joint lives for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question. The essential thing is that the policy should be obtained in good faith, and not for the purpose of speculating on the hazard of a life in which the assured has no interest.' There are other authorities holding the same doctrine, but we have referred to enough to show the current of authority on the question.' The first section of the act under which the defendant is organized, in express terms authorizes the organization of such associations for the purpose of furnishing life indemnity or pecuniary benefits to devisees or legatees. If as is plain from the language of the statute, a person may take out a policy on his own life, and devise such policy to a stranger, what principle of public policy would be violated by a provision in the policy making it payable to a stranger, in lieu of doing the same thing by will? If the policy may be made payable to a stranger, who has no insurable interest in the life of the insured, as it may be by statute, we perceive no reason which will prevent the same thing being done by a clause the insured may have inserted in the policy at the time the insurance is procured. We have been cited to *Mutual Ben. Ass'n v. Hoyt*, 46 Mich. 473, as an authority holding that the policy is contrary to public policy and void. The case cited sustains that view, but we do not regard it in harmony with the current of authority; and are not inclined to follow it. We think the better rule is, where a person obtains a policy on his life of his own accord, and pays the premium himself, he may if he desires make the policy payable to one who has no insurable interest in his life, and by so doing no rule of law or principle of public policy will be violated."

A person who has no insurable interest in another's life cannot recover upon an insurance policy on such life, which is purchased during the life-time of the insured, and the sale and transfer of a policy of insurance by the beneficiaries during the life of the insured, to one who has no insurable interest in the life of the insured, is a fraud upon the insurance company by which it was issued. *Frank v. Mutual Life Ins. Co.*, 103 N. Y. 266, is referred to as an authority that the beneficiaries can maintain an action upon the policy notwithstanding the assignment to Mrs. Parker. The courts of New York hold that a valid policy of insurance, effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the insured, to the full sum payable, without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the insured. *St. John v. Ins. Co.*, 13 N. Y. 31; *Valton v. Assurance Co.*, 20 N. Y. 32. This court refused to follow the decisions of New York in *Insurance Co. v. Sturges*. The decision in *Frank v. Ins. Co.*, *supra*, was rendered under a statute making a policy procured on the husband's life for the benefit of the wife unassignable. The validity of an assignment of a policy to one having no insurable interest in the life of the insured did not enter into the case. There was a want of power to assign. Therefore that case has no affinity with the one under consideration. Supreme Court of Kan-

Bursinger v. Bank of Watertown.

sas, January 7, 1887. *Missouri Valley Life Ins. Co. v. McCrumb*. Opinion by HORTON, C. J.

Murphy v. Red, Mississippi Supreme Court, April 11, 1887, is in harmony with the principal case. The court said: "It is shown that the husband of appellee, before his death, assigned the policy on his life for a valuable consideration, to appellant's intestate. It is not suggested that there was any purpose in procuring the policy to evade or circumvent the laws against wager policies; but it is affirmed on the one side, and denied on the other, that the fact that the assignee had no insurable interest in the life insured vitiated the assignment, and the case will be considered in that aspect. It is generally agreed that mere wager policies (that is to say, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction) are void as against public policy. *Mutual Ins. Co. v. Schaefer*, 94 U. S. 457. And it must be admitted that there are decisions and *dicta* to the effect that it is unlawful for the holder of a life insurance policy on his own life to sell or assign the same, under any circumstances, to one who has no insurable interest in the life insured. Courts which deny the validity of such sale or assignment, manifest great sensibility in regard to the danger which such transaction, if sanctioned, would cause to human life. They say that all the objections against issuing a policy directly to one on the life of another in whose life the former has no insurable interest, exist against his holding such policy by mere purchase and assignment from another; that in either case, the holder of such policy is interested in the death, rather than in the life, of the insured; and that the speculative or gambling element is the same, and the temptation to shorten the life of the insured is the same in the one case as in the other.

"The weight of reason and authority, we think, is against this view. There is an obvious difference between the two transactions. It is contrary to public policy for a person to insure a life in which he has no insurable interest, and to derive benefit or advantage therefrom. This is condemned as gaming or wagering on the chances of human life, and as such, is prohibited by law. But it is lawful for one to insure his own life, and after he has done so, the policy becomes his own, if payable as in this case, and there is no good reason why he may not sell or dispose of it as he may of any other chose in action, if the policy was valid in its inception. *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496; *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y. 81; *Mut. Life Ins. Co. v. Allen*, 188 Mass. 24; *Valton v. Assurance Co.*, 20 N. Y. 32; *Olmstead v. Keyes*, 85 N. Y. 993; *Ashley v. Ashley*, 3 Sim. 149; *Currier v. Cont. Life Ins. Co.*, 52 Am. Rep. 134, note; *Bussinger v. Bank, etc.*, 30 N. W. Rep. 290.

"A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business or absolute necessity may require him to do so. He may have paid large sums in premiums, and afterward become unable to pay any more, and if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed and lost. To impair the value and utility of his policy, or require him to lose it, on the ground that if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one

Bursinger v. Bank of Watertown.

who had no insurable interest in his life would be tainted with the vice of gambling, is, as matter of law, extremely fanciful and unsatisfactory.

"Other interests and conditions generally prevalent, and involving tendencies quite as fatal to human life, may be created and are maintained without any such restriction. It seems that a life-tenant would be in about as much danger from the remainder-men, and a testator from a person having no interest in his life, for whom he had made provision by will, as the insured would be from the assignee or purchaser, without interest, of a life insurance policy. An insurable interest in the assured, at the time the policy is issued, is essential to the validity of the policy, but it has often been decided, as where a creditor takes out a policy on the life of his debtor, that it is not necessary to the continuance of the insurance that the interest in the life insured should continue. Cessation of interest, payment of the debt in the case supposed, would not terminate the policy. *Dalby v. India Ass. Co.*, 15 C. B. 365; *Law v. London Policy Co.*, 1 Kay & J. 223; *Conn. Ins. Co. v. Schaefer*, 94 U. S. 457; *Rauk v. Am. Ins. Co.*, 27 N. Y. 262; s. c., 84 Am. Dec. 283; *Provident Ins. Co. v. Baum*, 29 Ind. 236; *Currier v. Continental Ins. Co.*, 53 Am. Rep. 134, note.

"If the danger to life is not adequate to avoid the policy in such case, when the interest in the life insured ceases, it is not perceived why it should be deemed sufficient to invalidate a contract by which a policy is sold and assigned to one without interest. Besides the protection should not be overlooked which is afforded to the life insured by the doctrine that one cannot recover insurance money payable on the death of a party whose life he has taken by felonious means. It would be a reproach to the law of the land if he were allowed to do so. He could not in fact do so, any more than he could recover insurance money on a building which he had wilfully set fire to and burned. *Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591.

"In *Mutual Life Insurance Co. v. Allen*, *supra*, the Supreme Court of Massachusetts, after removing all doubt as to the meaning of the decisions in that State on the subject, and referring to the *dicta* in *Cammack v. Lewis*, 15 Wall. 643, and *Warnock v. Davis*, 104 U. S. 775, and *Franklin Ins. Co. v. Hazard*, 41 Ind. 116, and showing that it was not decided in either of these cases that all assignments of life insurance policies without interest are illegal, said 'that the right to receive money on the death of another is assignable at law or in equity will not be questioned. It is true that every person who is in expectation of property at the death of another has an interest in his death, but it does not follow, and it is not true, that the law does not allow the possession and assignment of such expectations. The objection applies with equal force to the assignment of a provision made for one upon the death of another by deed or will, as to the assignment of a like provision in the form of a life insurance. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his own advantage, and the fact that the assignee has no insurable interest in the life insured is neither conclusive nor *prima facie* evidence that the transaction is illegal.'

"We are unable to subscribe to the doctrine that the assignee or purchaser of a life insurance policy, valid in its inception and transferred according to its terms, is not entitled to its proceeds, by reason of his want of interest in the life insured."

Burdinger v. Bank of Watertown.

In *Price v. Supreme Lodge Knights of Honor*, Texas Supreme Court, it was held that the assignment by one of an insurance policy issued upon his own life to his cousin who lives with him as an adult male member of the family, and is independent of the insured for employment and support, upon an agreement by the assignee to pay the assessments necessary to keep the policy in force, is void. The court said: "It is almost universally conceded that policies procured by persons having no interest in the life of the insured are void at common law, as against public policy. The policy-holder has nothing to lose for which he can claim indemnity; on the contrary, his interest is in early death of the insured. When that occurs he ceases to pay premiums, and receives the amount of the policy. This creates a temptation to destroy human life, and the common law forbids the contract. These are the grounds upon which such policies are held to be void. Are they applicable to a case where the policy is first taken out by the person whose life is insured, and then transferred by him to one who has no interest in his life? It is pretty generally held that if a person effects insurance upon his own life, and in pursuance of a previous agreement, immediately, and without consideration, transfers the policy to one who has no interest in his life, but who agrees to pay the premium upon the policy, it will be void. *Suitt v. Ins. Co.*, 2 Dill. 160; *Stevens v. Warren*, 101 Mass. 564; *Murray v. Ins. Co.*, 9 R. I. 346. And it has been held by the Supreme Court of the United States that a transfer would not be enforced under such circumstances, though the insured were indebted to the assignee in a small sum disproportionate to the amount of insurance on his life; but the policy would be deemed security for the debt, and such advances as might afterward be made on account of it. *Cummaok v. Lewis*, 15 Wall. 643. Is there such difference between the principles upon which these decisions rest, and those applicable to the sale of a policy already procured to an assignee having no interest in the assured, as to make the latter lawful, while a policy procured without interest, and an assignment in pursuance of a previous agreement, are held invalid? The Supreme Court of the United States, in the case of *Warnock v. Davis*, 104 U. S. 775, says it cannot see any such difference; and proceeding upon this view, many of the State courts have held such assignments void, or treated the assigned policies as mere securities for the moneys actually advanced by the assignee. *Ins. Co. v. Hassard*, 41 Ind. 116; *Ins. Co. v. Sefton*, 53 Ind. 890; *Ins. Co. v. Sturges*, 18 Kan. 93; *Gilbert v. Moore*, 104 Penn. St. 74; *Bayne v. Adams*, 81 Ky. 368. This too is the conclusion to which many eminent text-writers have arrived. *May Ins.*, § 898; *Greenh. Pub. Pol.* 288. On the contrary, the courts of several States have held such assignments valid, though the assignee could not have taken out for his own benefit an original policy upon the life of the assignor. *Clark v. Allen*, 11 R. I. 489; *Marcus v. Ins. Co.*, 68 N. Y. 625; *Clark v. Durand*, 12 Wis. 223; *Ins. Co. v. Allen*, 138 Mass. 24. We think those decisions which hold these assignments invalid are based upon the more satisfactory reasoning. When the policy is transferred it becomes the property of the assignee. He is subject to all the obligations imposed by it, and entitled to all its benefits. He becomes the holder of a policy upon the life of a person whose early death will bring him pecuniary advantage. The temptation to

 Ellis v. Milwaukee City Railway Company.

bring about this death presents itself as strongly to him as to a party who originally effects insurance for his own benefit upon the life of another. Public policy removes the temptation to take human life, and it cannot matter how that temptation is brought about. If by reason of a contract between two persons the one is tempted by pecuniary interest to destroy the other, the form of the contract is of no importance in testing its invalidity. The law looks to the substance of the matter — the relation which the parties will bear to each other after the contract is executed; and if its natural effect is to encourage crime, it will be avoided, no matter in what shape it may be presented. Those courts holding a contrary view say that a policy of insurance is a chose in action, and the owner may dispose of it as he pleases. But when it is asserted that the owner of property may dispose of it at his pleasure, the assertion must be taken with the qualification that he does not thereby violate any provisions of law, or contravene public policy. It is further said, that because a contract is speculation, though human life be the subject of the speculation, it is not necessarily invalid; for instance, it is not unlawful to transfer an annuity, or an estate in remainder after a life estate. If this reasoning be good, it would validate a policy taken by one having no interest in the life insured, as well as an assignment of a policy to such a person, for it is not unlawful to grant or create an annuity, or an estate in remainder after a life estate, any more than it is to transfer one of these after it is created. Yet wager policies are almost universally held void, while annuities are sustained. Why this should be is not necessary to discuss. It is sufficient that no analogy drawn from annuities or life estates can be used to uphold policies procured in violation of public policy, and hence no such analogy of this kind can sustain an assignment of the same character."

 ELLIS V. MILWAUKEE CITY RAILWAY COMPANY.

(67 Wis. 135.)

Railways — street — ordinance fixing fares — separate lines to different termini.

A municipal ordinance provided that the fare on any horse railway in the city should not exceed five cents. When it was enacted the defendant was operating a single line of railway. Afterward it constructed and operated other lines diverging from the main line. *Held*, that the ordinance did not confer the right, upon payment of five cents, to ride on a car bound for one *terminus*, and at the point of divergence, to take another car to a different *terminus*.

ACTION for unlawful ejection from a street car. The opinion states the case. The plaintiff had judgment below.

Finches, Lynde & Miller, and B. K. Miller, Jr., for appellant.

Small & Hopkins, for respondent.

Ellis v. Milwaukee City Railway Company.

ORTON, J. The plaintiff and respondent on this appeal, in June, 1885, entered one of the cars of the defendant company, at the corner of Fourth avenue and Mitchell street, in the south part of the city of Milwaukee, for the purpose of going to the base-ball ground at the corner of Twelfth and Wright streets, in the north part of said city, to which point one of the cars of said company ran on one line of its road. He was informed by the conductor, when he offered to pay his fare of five cents, that the car he was on did not run to that point, and that to go there he would have to take another car, but that he could ride on that car as far as it ran on that line, and then he would have to take another car and pay another fare of five cents on the same. The plaintiff then asked the conductor if he would not give him, at the point of divergence, a transfer ticket which would entitle him to ride to his destination, and the conductor told him that he could not, and he then paid his fare. At the point where the road to the base-ball ground diverged from the line on which that car ran, the plaintiff again demanded a transfer ticket, which was again refused, and he left the car, and waited a short time for the arrival of another car bound for his destination, and then entered that car. The conductor of that car asked the plaintiff for his fare, and he replied that he had paid his fare on the Third street car and refused to pay more fare. He was informed that if he did not pay he must leave the car, and he replied that he would not do so. The conductor delayed putting him off until he had made three other demands for his fare, and he had refused, and then he stopped the car at a crossing and by no great display of force put the plaintiff off. He landed on his feet, and suffered no injury, although he and the conductor were somewhat excited. After being thus put off, he almost immediately jumped on the car again, and paid his fare under protest, and rode to his destination.

On the 23d day of October, 1871, the common council of the city passed an ordinance amending an ordinance of March 26, 1866, to amend an ordinance entitled "An ordinance to authorize the construction and operation of certain horse railways in the city of Milwaukee," passed May 29, 1865, as follows:

"Sec. 2. Hereafter the rate of fare for a single passenger in any horse railway operated within the city of Milwaukee shall not exceed the sum of five cents."

This ordinance was declared to have been passed for the sole

Ellis v. Milwaukee City Railway Company.

purpose of preventing extortion by the said company. At the time the ordinance was passed this company was operating only one line of railway, north and south, near the center of the city, and near the Milwaukee river, and all cars thereon went to the same points of termination, and so far as this company was concerned, this ordinance affected only this line of road as then operated. Afterward, and before the year 1883, this company had constructed at least four lines of road diverging from the main line toward the south and toward the north to as many points of termination and localities, and one of these lines ran to the base ball grounds, the destination of the plaintiff. The car upon which he took passage did not run to that point, but to a point south of and quite distant from it. When these lines of road were built, by a regulation of the company as many different lines of cars ran upon the main line and to these several terminations, and these various lines were operated as distinct and separate lines of road. When in 1882, the company was about to construct a line of road diverging from the old main line and running along Chestnut street, the common council passed an ordinance authorizing such extension, and providing that such new line should be operated in connection with the main line, and that only one fare of five cents should be charged for the whole route, and that at the point of intersection a transfer ticket should be given to the passenger going on such new line. Since the other diverging lines have been built and operated no ordinance has been passed relating thereto, in respect to rates of fare or transfer tickets, but these several lines are left to be governed, if at all, by the ordinance of 1871, as to the rate of fare. It appears that the company, on the completion of these several lines, for one year only adopted the plan of giving transfer tickets on all of them; but they found that, under such a regulation, passengers could defraud the company by getting on a line, going west a short distance, then going south a short distance, and then going back, and passing around a circle; and the company then abandoned such a general regulation, and has since given transfer tickets only on the Chestnut street line, as required by said ordinance.

This is a brief and substantially correct statement of the case. The plaintiff brought this suit to recover damages for being thus expelled from the car, and recovered \$150.

On the conclusion of the plaintiff's testimony, as stated substan-

• Ellis v. Milwaukee City Railway Company.

tially above, there was a motion for a nonsuit, and at the conclusion of the evidence on both sides, the defendant company moved for a verdict by direction of the court, which was denied.

1. We think that the regulation or custom of the company, by which several distinct and separate lines of cars are run between different *termini*, is a reasonable one. The various lines could not be operated in any other way to accommodate the travelling public. *Yorton v. M., L. S. & W. R. Co.*, 54 Wis. 234.

2. We are quite confident that the ordinance of 1871, fixing the rate of fare, has no application to the connecting lines of road afterward constructed. The rates of fare of passengers on the road of such a corporation ought to be reasonable, affording a reasonable compensation to the common carrier, and imposing no unreasonable burden upon the passenger. *Att'y-Gen. v. Railroad Cos.*, 35 Wis. 425. It may be conceded that the common council of Milwaukee had the right and authority to fix such reasonable rate by ordinance; but such rate should be fixed so as to give the company reasonable compensation for its service, in view of the location and length of its road. In respect to railways operated by steam-power through the country, such rates for passengers, where fixed by law, are generally, if not always, rated per mile. In such cases, the length of lines and distance of travel would make no difference. On horse railways, the fare is generally fixed at a certain sum for a given line of road, arbitrarily; but should, of course, be so fixed as to be reasonable, and proportionate to the service rendered to the passenger and to the profits of the company. It is presumed that the common council fixed the rate, in 1871, in view of this rule, and took into consideration the location, business, and length of the main line then in operation. Suppose the legislatures of Illinois and Wisconsin had seen fit to fix the passenger fare on the Chicago and Northwestern railway at the arbitrary rate of five dollars as soon as the road had been completed from Chicago to Madison, and that company had then no other line. Afterward the line was extended, and many intersecting lines had been built. Would that rate continue, by the mere force of such a law, as the rate from Chicago to the distant terminus of its line and to any *termini* of connecting lines? If so, the rate would be most unreasonable against the company, and the company would derive no compensation or profit whatever from such extended and new lines. If the rate was reasonable when the line

had its *termini* at Chicago and Madison, as it must be presumed it was, then such a fixed rate becomes more and more unreasonable as the line is extended, and connecting lines are built, and increased service is rendered, at great additional cost to the company. So, in this case, the common council fixed this arbitrary rate, presumed then to be reasonable, on the old and main line of road. That line has been extended, and connecting lines have been built, since such rate was fixed; that rate was fixed without any reference to the present state of things, or new lines, and with reference only to the roads then existing; and hence we say that the ordinance of 1871 has no application to the connecting lines since constructed.

The common council, as the legislative body in respect to such ordinances fixing the rate of passenger fare over its lines of street railway, has placed such a legislative construction upon the ordinance of 1871 by another ordinance of 1882, by which the same rate is continued on the main line and on the first connecting line, and a transfer ticket required to be given. On the subject of the fare on the main line and the other connecting lines, the common council has not acted. The ordinance of 1871 has been treated as if made with special reference to this road. What has been said would be true of all other roads in their then condition, and in respect to their new lines.

3. It would not seem to be material whether the ordinance of 1871 actually fixed the rate of passenger fare on the main line and over the connecting lines since built, or not; for the company conceded to the plaintiff the right to go upon the car he was on to the end of its route on one of the connecting lines, for the fare he had paid; and also the right to have gone over the main line and the connecting line to his destination for the same fare, if he had taken the proper car of the company which ran on that line. We have already said that the regulation or custom by which these several lines of cars were run on the several lines of road was reasonable and probably necessary. The plaintiff was informed of this regulation before he paid his fare. The company had provided for him cars to his destination, and all he was required to do was to go aboard of such cars. He chose not to do so, but to go aboard of the wrong car, and demand that he might be carried to his destination on one fare of five cents, and to be transferred to another line for that purpose. These matters are proper subjects of legislation by the common council, and until they pass an ordinance

Saveland v. Fidelity and Casualty Company of New York.

changing the rate of fare, or fixing the rate of fare over all the lines of road, and requiring transfer tickets from one road to another to be given to passengers, the traveling public must comply with and abide by the present regulation. Such a regulation is binding upon travellers having knowledge of it. *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; *Wakefield v. South Boston R. Co.*, 117 Mass. 544. In this last case the passenger had paid his fare on two connecting lines of the road, and claimed to ride a third line. He was ejected from the third car, and was not allowed to recover. In *McMahon v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 282, it was held that a similar regulation was binding upon a passenger, if known to him.

The plaintiff could easily have taken the proper car and gone to his destination on one fare. But he chose to violate a reasonable regulation of the company, by going upon the wrong car and demanding of the conductor a transfer ticket, which the conductor, by such regulation had no right to give, and he knew it. Until the company's rates are fixed by law for a transfer of a passenger to another line of its road, the company has a right to fix such rates as are reasonable, and there was no evidence in this case that such rates were not reasonable. The jury should have been instructed to find a verdict for the defendant. If the plaintiff had been entitled to recover at all in this case, he was only entitled to nominal damages. He was ejected from the car by the conductor, whose duty it was to do so, after repeated warnings, in an unusually careful and prudent manner, without inflicting upon him any personal injury. *Yorton v. M., L. S. & W. R. Co.*, *supra*. But he was not entitled to recover, and therefore the excessive verdict is immaterial.

BY THE COURT. — The judgment of the County Court is reversed and the cause remanded with directions to that court to grant a new trial in the cause.

SAVELAND V. FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(87 Wis. 174.)

Insurance — accident — "total disability."

A policy provided that in case of accidental injuries which should "wholly disable and prevent him from the prosecution of any and every kind of busi-

Saveland v. Fidelity and Casualty Company of New York.

ness pertaining to his occupation," the insured should be indemnified against loss of time thereby "for such a period of continuous total disability" as should immediately follow, not exceeding, etc. In an action thereon, the jury were instructed that the defendant was liable if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor, to some extent." *Held*, error.

ACTION on an accident policy. The opinion states the point. The plaintiff had judgment below.

A. G. Weissert, for appellant.

J. E. Wildish and *J. C. Officer*, for respondent.

CASSIDAY, J. The cause was submitted to the jury on the theory that it was the object of the policy to insure the plaintiff against accident, and to pay the plaintiff what the company had agreed to pay for the accident he had received, if by that accident he had been disabled in any way from prosecuting the business in which he was engaged; that it was to indemnify the plaintiff "for his want of capacity to prosecute the business in which he was engaged;" that the plaintiff was "entitled to recover, at the rate agreed on in the policy, for such time as by reason of such accident he" was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent." The learned trial judge was supported in such theory by the language of the court in *Sawyer v. U. S. Casualty Co.*, 8 Am. Law Reg. (N. S.) 233. The clause of the policy there involved was, "totally disable him from the prosecution of his usual employment." The case was in the Superior Court of Worcester, Massachusetts, but never reached the Supreme Court of that State, nor do we find it referred to in any subsequent case in any court. That case apparently followed *Hopper v. Accidental D. Ins. Co.*, 5 Hurl. & N. 546, where the clause of the policy relied upon was, "any bodily injury to the said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits;" and it was held, in effect, that a disability which incapacitated the assured from "following his usual occupation, business, or pursuits," was a

Saveland v. Fidelity and Casualty Company of New York.

breach. In neither of those cases was the language of the policy so broad and sweeping as in the case at bar. The language of this policy is even more sweeping than in *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. 77, where it was held that there could be no recovery because it was not shown that there was a "total disability to labor." In that case the language of the policy was, "accident and injury, which totally disabled and prevented from all kinds of business." The same is true with respect to *Lyon v. Railway Pass. Assur. Co.*, 46 Low, 681, where the language of the policy was, "while totally disabled and prevented from the transaction of all kinds of business;" and it was held that such language could not be construed to mean "partially disabled from some kinds of business."

Here the plaintiff was only entitled to recover in case the injury was such as to "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation;" and then only "for such period of continuous total disability," not exceeding the amount stipulated, nor "the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks." The ordinary object of a policy of insurance may be such as stated by the learned trial judge, but the manifest purpose of this policy was to obtain premiums by incurring as little risk as possible. But there was no law to prevent the parties from making their own contract. The plaintiff consented to and made this one. He cannot repudiate or alter its conditions in the day of his calamity. The courts are powerless to make a new contract for him or to strike some words from the contract he made for himself, and insert others, and thus enlarge the risk, in order to meet the expectation of the plaintiff in obtaining the policy. This we should be compelled to do, in order to sanction the charge to the jury. The plaintiff's right to recover is necessarily restricted to the time he was wholly disabled and prevented "from the prosecution of any and every kind of business pertaining to his occupation."

By THE COURT: The judgment of the County Court is reversed, and the cause is remanded for a new trial.

VOL. XLIII — 108

HUBBELL V. CITY OF VIROQUA.

(87 Wis. 343.)

Municipal corporation — negligence — nuisance — shooting gallery.

A city licensed a shooting gallery. It was a mere tent adjoining a sidewalk. The plaintiff in passing was injured by a ball coming through the tent. *Held* (1), that the structure did not constitute an "insufficiency" of the street, within the statute; (2), that a shooting gallery in a city is not *per se* a nuisance.*

Proctor & Skaar, for appellant.

O. B. Wyman, for respondent.

TAYLOR, J. Upon the hearing of this appeal the learned counsel for the appellant contends (1) that the complaint sets up a good cause of action against the city under the provisions of section 1339, Revised Statutes 1878, which provides that "if any damage shall happen to any person, his team, carriage, or other property, by reason of the insufficiency or want of repairs of any bridge, sluiceway or road in any town, city or village, the person sustaining such damage shall have the right to sue for and recover the same against any such town, city or village;" and (2) that the complaint states facts sufficient to constitute a cause of action against the city for knowingly permitting the erection and maintenance of a public nuisance in said city.

It seems to us very clear that there are no allegations in the complaint which show any insufficiency or want of repair of the street or sidewalk so as to bring the case within the provisions of the statute above quoted. The shooting gallery was neither in the street, nor within the boundaries of the sidewalk, but outside of the same, presumably upon private property, and no more obstructed the sidewalk than any other building erected adjoining such walk. A highway may be insufficient, within the meaning of the statute, on account of a precipice or excavation immediately adjoining the travelled part thereof, unless a barrier be placed along such precipice or excavation. It may be insufficient if a dangerous structure is permitted to overhang a travelled part

* See *Taylor v. Mayor, etc.* (64 Md. 68), 54 Am. Rep. 759; *Blumb v. City of Kansas* (84 Mo. 112), 54 Am. Rep. 87, and note, 90.

Hubbell v. City of Viroqua.

thereof, or by permitting excavations under the surface of the street, which render the same dangerous, or by defects or obstructions upon its surface. But we can find no case where a street or highway has been held insufficient or out of repair within the meaning of the statute, by reason of the erection of a tent, house, or other structure upon private property outside the limits of the street or highway. Persons erecting such structures near a public highway, if they erect or maintain them in such manner as to interfere with the safety of persons travelling such highway, may be answerable for any damage caused by the existence of such structures to persons travelling such highway; but they do not constitute an insufficiency of the highway itself within the meaning of the statute, so as to render the town, city, or village in which they are situated liable for the damage caused by their existence. The following cases in this and other courts fully establish this proposition. *Schultz v. Milwaukee*, 49 Wis. 254, 259; *Ray v. Manchester*, 46 N. H. 59; *Hutchinson v. Concord*, 41 Vt. 271; *Little v. Madison*, 42 Wis. 643; 49 Wis. 605; s. c., 24 Am. Rep. 435; *Hixon v. Lowell*, 13 Gray, 59; *Jones v. Boston*, 104 Mass. 75; s. c., 6 Am. Rep. 194; *Wood Nuis.* (2d ed.) 825, and notes; *Norristown v. Fitzpatrick*, 94 Penn. St. 121; s. c., 39 Am. Rep. 771; *Lorillard v. Monroe*, 11 N. Y. 396; s. c., 62 Am. Dec. 120; *Pierce v. New Bedford*, 129 Mass. 534; *Barber v. Roxbury*, 11 Allen, 318; *Lyon v. Cambridge*, 136 Mass. 419; *Macomber v. Taunton*, 100 Mass. 255.

Although it is apparent from the form and general allegations of the complaint that the learned counsel who drew the same intended to state a case against the city under the provisions of the statute above quoted, he now insists that if he has failed to make out a case under that statute there is sufficient to show that the city knowingly permitted a public nuisance to exist in the city, adjacent to a public street, which endangered the lives of persons travelling upon such street, and consequently the city is liable for the injury which happened to the plaintiff from the existence of such public nuisance.

Whatever may have been decided by other courts upon this point, this court has held in the cases of *Little v. Madison* and *Schultz v. Milwaukee*, *supra*, that an action will not lie against a municipal corporation for not suppressing a public nuisance within the municipality, when such nuisance is not created or maintained by the express authority of the municipality, and when such public nui-

Hubbell v. City of Viroqua.

sance is not the result of some act done, or neglected to be done, in the performance of a duty imposed upon the municipality by law, such as repair of streets, constructing sewers, water or other public works. This doctrine is well sustained by authority. See *Nerriestown v. Fitzpatrick*, 94 Penn. St. 124; s. c., 39 Am. Rep. 771; *Elliot v. Philadelphia*, 75 Penn. St. 347; s. c., 15 Am. Rep. 591; 2 Dill. Mun. Corp. (3d ed.), §§ 975, 976; *Buttrick v. Lowell*, 1 Allen 172; s. c., 79 Am. Dec. 721; *Cole v. Newburyport*, 129 Mass. 594. A municipal corporation is not liable for injuries caused to the persons or property of the citizen by the criminal acts of individuals unless made liable by statute. 2 Dill. Mun. Corp. (3d ed.), §§ 959, 960, 961; *Darlington v. New York*, 31 N. Y. 164, 187, 188; *Western College v. Cleveland*, 12 Ohio St. 375; *Prathers v. Lexington*, 13 B. Monr. 559; s. c., 56 Am. Dec. 585; *Ward v. Louisville*, 16 B. Monr. 184; *Griffin v. New York*, 9 N. Y. 456; s. c., 61 Am. Dec. 700; *Lary v. New York*, 1 Sandf. 465. When a public nuisance is created by a private citizen in carrying on his business or trade within a city or other municipality, unless the municipality by express license authorizes such business to be carried on at the place and in the manner the same is conducted by such private citizen, the municipality cannot be held responsible for any damage which may result to another citizen from the existence or maintenance of such nuisance.

This court also held in the cases above cited that the mere fact that the proper city authorities licensed the carrying on of such business within the city limits for a compensation paid for such license, does not render the city liable for an injury caused by its being carried on in an improper manner or at an improper place. If the thing licensed could be carried on without becoming a public nuisance if carried on in a proper place and proper manner, the city is not liable for the consequence resulting from its being carried on in an improper manner or in an improper place. If the city can be made liable at all for the results of carrying on the business in an improper manner or in an improper place, the allegations of the complaint and the evidence must show affirmatively that the license granted authorized the licensee to carry on the business in the manner and at the place which rendered it a public nuisance. A mere license to carry on the business generally within the city limits will not be construed to be a license to carry on the business in an improper place or in an improper manner.

Alexander v. Continental Insurance Company of New York.

"We cannot hold, as a question of law, that a shooting gallery erected in a proper place and conducted in a proper manner is a public nuisance. On the contrary, we are of the opinion that such a gallery is not a public nuisance at common law, and in the absence of any statute declaring it to be such, it must be considered a lawful business when carried on in a proper manner and place. The mere granting of a license by the municipal authorities to carry on a shooting gallery within the corporate limits of the city, was not therefore a license to keep and maintain a public nuisance within said limits, and the city is not chargeable for injuries resulting from an abuse of his license by the licensee. When the licensee creates a public nuisance by an abuse of the license granted to him by the city, the city is no more liable for the damaging results of such nuisance than it would be for the damage caused by any other public nuisance by a citizen, within the municipality, by carrying on his business in such city without a license from the city.

We are also inclined to hold that the allegations of the complaint do not clearly show that the shooting gallery, as it is alleged to have been conducted and in the place where located, was a public nuisance; but in the view we have taken of the case, it is unnecessary to decide that question.

BY THE COURT—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

ALEXANDER V. CONTINENTAL INSURANCE COMPANY OF NEW YORK.

(57 Wis. 422.)

Insurance—condition—notice—waiver.

An insurance premium note was received by the authorized agent of the company, who executed for it a receipt, on the back of which was a notice that fifteen days before any installment was due the assured would be notified by the company. *Held*, that the omission to give such notification waived a condition for forfeiture in the policy.

ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

O. H. Lamoreux and E. L. & Paul Browne, for appellant.

Charles W. Folger, for respondent.

Alexander v. Continental Insurance Company of New York.

TAYLOR, J. This action was brought upon a fire insurance policy to recover for a loss arising during the time covered by the policy. The insurance was for five years. A cash premium of \$11.75 was paid when the policy was issued, July 7, 1876, and a note given for the balance of the premium, to be paid in annual installments of \$11.75, on the 7th of July, 1877, 1878, 1879, and 1880. The first installment was paid on the note, not on the day it became due, but on the 4th of October, 1877. The subsequent installments were not paid, and the loss took place May 7, 1881. The policy contains, among other things, the following conditions: "This company shall not be liable for any loss or damage under this policy if default shall have been made in the payment of any installment of premiums due by the terms of the installment note. On payment by the assured or assigns of all installments of premiums due under this policy and the installment note given thereon, the liability of this company under this policy shall again attach, provided written consent of the superintendent of the western department be first obtained, and this policy be in force from and after such payment, unless this policy shall be void or inoperative for some other cause. But this company shall not be liable for any loss happening during the continuance of such default of payment, nor shall any such suspension of liability under this policy, on account of such default, have the effect of extending such liability beyond the period of its termination as originally expressed in writing hereon. It is further provided that no attempt, by law or otherwise, to collect any note given for the cash premium, or any installment or premium due upon any installment, shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive this policy. But upon payment by the assured or his assigns of the full amount due upon such note, and costs, if any there be, this policy shall thereafter be in full force, unless the same shall be inoperative or void from some other cause than the nonpayment of such note."

The complaint sets out the policy at length. It states the loss, and proof thereof; demand of payment, and refusal to pay; and in regard to the payment of the premium, the following allegations are made:

"And the plaintiff further alleges that at the time of said application for said policy, and the payment of said cash premium, and the execution of said premium note as aforesaid, the said John Gray, who was the authorized agent of said defendant company, executed

Alexander v. Continental Insurance Company of New York.

for and in behalf of said defendant, a receipt to said plaintiff for said application, cash premium, and said premium note, on the back of which receipt was a notice stating that fifteen days before any installment became due on said note the said plaintiff would receive notice from said defendant of the fact and the time when such installment so became due, which notice was read to said plaintiff by said agent, and by her relied on, and which this plaintiff alleges was given at the time of the execution of said note and was and is one of the conditions on which said note was given; that said agent, Gray, further informed the said plaintiff that said notice of fifteen days would surely be given to her by said defendant company, and which she relied on and expected to be given her as aforesaid.

“That the first installment of said note became due and payable on the 1st day of July, 1877, and that said defendant neglected to give her the said notice until on or about the 4th day of October, thereafter, at which time such notice was so given by an authorized agent of said company, and said plaintiff paid said installment of \$11.75 to said agent on the said 4th day of October, 1877.

“The plaintiff further alleges, that at the time of the payment of said first installment as aforesaid, the said defendant company, by its last aforesaid authorized agent, promised and agreed to and with the said plaintiff that the said defendant company would give her fifteen days' notice before the next and each unpaid installment became due, and would call upon her personally to pay the same, which promise and agreement the said plaintiff relied upon, and expected said notice from said company, but that since said time the said note has never been presented to her for the payment of other installments, nor has she ever been requested by said defendant company or any one in its behalf to pay the other installments or to send the same by mail or otherwise, nor has the said plaintiff ever had or received any notice whatever that any installment on said note had become due since the first installment paid as above set forth, and the plaintiff alleges on information and belief that said defendant company purposely and for its own advantage withheld the said promised notice, well knowing that the said plaintiff relied on the same, in order to defeat a recovery on said policy in case of loss. The plaintiff further alleges that said premium note has never been surrendered up to her, but that at the time of said fire and ever since said note was and is outstanding; that she has at all times been ready and willing to pay the other installments of

Alexander v. Continental Insurance Company of New York.

said note when the same became due, if the same had been presented to her by the owner or holder thereof, but the same was never presented to her for payment, or payment demanded of her, and she further avers that she had no knowledge of the whereabouts of said note, or in whose hands or possession it was or had been."

The defendant company demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrer, and from the order sustaining the demurrer the plaintiff appeals to this court.

The only question presented for our consideration on this appeal is whether the allegations above quoted from the complaint show a waiver on the part of the company of the condition in the policy that the company should not be liable for any loss or damage under the policy if default be made in the payment of any installment or premiums due by the terms of the installment note. We are clearly of the opinion that the payment of the money to become due upon the note, upon or before the day it became due, in order to continue the liability of the company on the policy, was waived by the agent of the company, and that the insured did not forfeit her rights under the policy by neglecting to pay the money on the note when it became due and payable by its terms. Against this view of the case the learned counsel for the respondent insists (1) that the agent of the company had no authority to waive this condition of the policy, and (2) that the facts alleged do not show any waiver.

The authority of the agent to waive the conditions of an insurance policy has been frequently asserted by this court as well as other courts. See R. S. 1878, § 1977; *Diner v. Phoenix Ins. Co.*, 37 Wis. 698; s. c., 9 Am. Rep. 479; *American Ins. Co. v. Gallatin*, 48 Wis. 36; *Schomer v. Hadla Ins. Co.*, 50 Wis. 576; *Roberts v. Continental Ins. Co.*, 41 Wis. 331; *Gans v. St. P. F. & M. Ins. Co.*, 43 Wis. 108; *Killips v. P. F. Ins. Co.*, 26 Wis. 472, 483; s. c., 9 Am. Rep. 506; *McBride v. Republic Ins. Co.*, 30 Wis. 562; *Parlier v. Amazon Ins. Co.*, 34 Wis. 363; 370; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Wright v. Hartford F. Ins. Co.*, 36 Wis. 622; *Winnis v. Allomania F. Ins. Co.*, 38 Wis. 342; *Sherman v. Munson Mut. Ins. Co.*, 39 Wis. 104.

This rule is absolutely necessary for the protection of the insured. The insured deals with no one but the agent; the company cannot deal with its patrons in any other way. Justice and law therefore require that the company shall be held to sanction what the agent

Alexander v. Continental Insurance Company of New York.

agrees to and upon which the insured relies. To allow the company to enforce a condition or forfeiture of the policy for a neglect to do that which the agent informs the insured shall not avoid the policy, would work the greatest injustice. This case is an illustration of the justice of the rulings of the courts upon this question.

The insured had taken a policy in which there is a condition that the policy shall terminate if any installment on the premium note is not paid promptly on or before the day it becomes due. The company has no place in the vicinity of the insured where the money can be paid. The agent says to the insured: "True, the policy says the liability of the company shall cease immediately if the money be not paid on the day, but I say to you, as agent of the company, that I will give you notice when payment is required." The insured, relying upon this promise of the agent, does not pay on the day. Two months or more after the day the agent appears and demands payment, and payment is made. No claim is made that there has been a forfeiture of the policy, or that it is necessary to have the policy renewed by procuring the written consent of the company in the manner prescribed in the contract, and the agent renews his promise to give notice when the next and subsequent installments should become due, and says he will call upon her personally for payment. No notice is afterward given, and no one calls for the money. The note is retained by the company, and not presented for payment, nor payment thereof demanded in any way, and in the meantime a loss occurs.

The condition or forfeiture in the policy having been once waived, and the insured having been led to believe that it would not be thereafter enforced, the company cannot enforce it except by an actual demand of payment of the money due on the note and a neglect or refusal to pay the same, or by a return of the note to the insured with notice that the company insists upon the condition in the policy. See *Marcus v. St. L. Mt. L. Ins. Co.*, '68 N. Y. 625; *Dilleber v. K. L. Ins. Co.*, '76 N. Y. 367; *Sheldon v. A. F. & M. Ins. Co.*, 26 N. Y. 460, 465; *Goff v. Nat. P. Ins. Co.*, '25 Barb. 189; *Devine v. Home Ins. Co.*, 32 Wis. 471, 477; *Howell v. K. L. Ins. Co.*, 44 N. Y. 276, 283; s. c., 4 Am. Rep. 675. See also many of the cases in this court cited above.

The case of *Dilleber v. K. L. Ins. Co.*, *supra*, was a case of a life policy, where prompt payment had been waived by the com-

Alexander v. Continental Insurance Company of New York.

pany; and afterward, when the insured offered to pay some days after the payment became due by the terms of the policy, the company refused to receive payment, and the insured shortly afterward died. It held there was no forfeiture. The court says: "It may be inferred that the company had waived a strict compliance with their written condition, and they also aid in the proper construction of the agreement of the parties made in April, 1860. Indeed, the conduct of both parties from the time of that transaction seems to indicate that they regarded it as a part of the arrangement of insurance, and the insured was not in fault in trusting to its continuance. The company was bound by it, and could not in good faith insist upon a strict compliance with the condition of payment until before a premium became due, they gave the insured notice that they should exact it. They cannot when their own interest seems to demand it, waive a condition, and after reliance upon it by the insured, withdraw the waiver without notice." The above argument is strictly applicable to the case at bar, upon the allegations made in the complaint, which, for the purposes of this case, are admitted to be true.

It is urged that the plaintiff should be held to have forfeited the policy because so long a time elapsed after the money became due and before the loss, and yet she had not paid or offered to pay. The fact of the lapse of time can make no difference. Either the terms of the policy had been waived, or they had not. If they had not been waived, then the forfeiture took place immediately after the money had become due and remained unpaid. A loss occurring on the day after would be within the condition and as fatal to a recovery as a loss two years after. As said above, the condition of the policy having been once waived, it could not be again revived without notice to the insured and a demand of payment of the money due.

It is also said that it would be unjust to allow the plaintiff to recover in this action, which was commenced after the statute of limitations had run against the note, and so the plaintiff would have the benefit of the insurance without payment of the premium. This objection, which certainly has an equitable foundation, is answered by a provision in the policy which reads as follows: "In case of any loss under this policy, this company may deduct any note, or installment thereof, given as a consideration for this policy." Under this clause of the policy, immediately upon a loss,

Schaefer v. Osterbrink.

the right of the company to deduct from the amount due the assured for such loss attached, and it continues, though the assured might delay bringing suit for the loss until the statute of limitations had run against the note.

Conditions of the policy set out in the complaint in this case, and upon which the company rely to defeat the claim of the insured, though not strictly forfeitures, are of a similar character, and if the company intends to rely upon them to defeat a loss, it must see to it that nothing has been done by it or its agents which can reasonably be understood by the insured as a waiver of such conditions.

By THE COURT. The order of the Circuit Court is reversed, and the cause is remanded with directions to overrule the demurrer.

Order reversed and cause remanded.

SCHAEFER V. OSTERBRINK.

(87 Wis. 495.)

Parent and child — negligence — agency of child.

Evidence that a minor son was in the habit of driving his father's team to convey the family to church, with the acquiescence of the father, and of an older daughter, who in the father's absence was in charge of the family, business and property, *held*, sufficient presumptively to charge the father with liability for the son's negligence in driving the team on another occasion.

ACTION for personal injuries by negligence. The opinion shows the case. The plaintiff had judgment below.

Bardeen, Mylrea & Marchetti, for appellant.

John Livermore and C. F. Eldred, for respondent.

CASSODAY, J. [Omitting other questions.] Exception was taken because the court charged the jury as follows: "The presumption is that a minor child living with his father and using his team and conveyance in and about the business of such father, is acting on his behalf and upon his directions, until the contrary is made to appear by the evidence. This fact established, and the burden to show that his son was not his servant is imposed upon the father." This is very nearly the exact language of Mr. Justice

TAYLOR in *Gerhardt v. Shady*, 37 Wis. 37, and seems to be a sound proposition of law. We do not understand this portion of the charge as a direction to presume that at the time of the accident the son was engaged in his father's business. On the contrary, the court had previously treated the question "as to whether the son was or was not the father's servant at the time of the accident," as counsel do, "one of the disputed issues in the case," and accordingly had submitted it to the jury for determination.

"True," the court continued, "the driving of the father's team for the purpose of conveying members of the family to and from church, in accordance with the usual habit or custom of the family with the knowledge and approval of the father or without objection by the father, will be regarded as driving the team in and about the business of the father. No contract of hire is necessary to create the relation of master and servant. It is sufficient to create that relation that one charged as servant, whether a son or person in no way related, is permitted habitually to perform the work, drive the team, or otherwise to act as a servant of the owner, according to the circumstances of the case, with the knowledge and consent or acquiescence of the latter, or with the knowledge or acquiescence of the agent in general charge of the business or property of the owner, in the absence of the latter." These instructions present the question whether the evidence of such prior habitual service on the part of Henry, his driving to and from church with his father's team, in accordance with the usual habit or custom of the family, with the knowledge or acquiescence of the father, and then, in his absence, of the older daughter in general charge of the business and property, was sufficient to justify the jury in finding that at the time and place in question, Henry was acting as the servant of his father and in the course of his employment. After a careful examination of all the facts and circumstances disclosed in the record and of the authorities cited by counsel, we are forced to the conclusion that the evidence is insufficient in law to sustain the verdict against the father as well as the son.

In *Bard v. Kohn*, 26 Penn. St. 483, cited, the son was several years past his majority, had a family of his own, and on the occasion in question took his father's team without permission, and was using them exclusively in his own business. Here Henry was a minor living with his father, and took his sisters to church as he had for years been accustomed to do with the knowledge of his

Garrey v. Stadler..

father.. In *Way v. Powers*, 57 Vt. 135, cited, the son was twenty-eight years of age, and the case is otherwise quite similar to the Pennsylvania case. The case of *Maddox v. Brown*, 71 Me. 432, s. c., 36 Am. Rep. 336, is more like this, for the son was a minor, but he was not using the horse and carriage in his father's business at the time.

That the jury were justified in this case in finding that the son was at the time acting as the servant of the father and in the course of his employment, see *Hoverson v. Noker*, 60 Wis. 513; *Gerhardt v. Swaty*, 57 Wis. 24; *Mulvehill v. Bates*, 31 Minn. 364; s. c., 47 Am. Rep. 796; *Evans v. Davidson*, 53 Md. 245; s. c., 36 Am. Rep. 400.

BY THE COURT.—The judgment of the Circuit Court is affirmed on both appeals.

Judgment affirmed.

GARREY V. STADLER..

(67 Wis. 519.)

Contract—implied—to pay consulting surgeon..

A consulting surgeon, who at the request of the attending surgeon and with the consent of the patient renders services to the patient, may recover from the patient although the attending surgeon had agreed with the patient to pay therefor, but without the knowledge of the consulting surgeon.

ACTION for services: The opinion states the case. The defendant had judgment below:

Crosby & Pink, for appellant.

C. F. Eldred, for respondent.

TAYLOR, J. The appellant, a physician and surgeon, brought his action against the respondent to recover for medical and surgical services performed for and upon the person of the respondent. There is no controversy as to the fact that the services were performed by the appellant, and upon the person of the respondent; nor as to the value of such services. The respondent alleges, however, as a defense to the action, that at the time the services were

rendered one Dr. Fleischer was his attending physician and surgeon, and that the appellant was called in for consultation with Dr. Fleischer and to aid and assist him in a surgical operation to be performed on the person of the defendant; and he further alleges that there was an existing contract between the respondent and Dr. Fleischer, by which contract Dr. Fleischer was to pay for any assistance or consulting physicians or surgeons he might need in properly treating the defendant in his then present sickness; that the appellant was called by Dr. Fleischer to attend the defendant and to assist in a surgical operation which was proper and necessary in treating the defendant; and insists that the appellant must look to Dr. Fleischer for his pay. There is not a particle of evidence in the case showing that the appellant had any knowledge of the existence of the alleged contract between the defendant and Dr. Fleischer at the time the appellant performed the services for which he demands pay from the defendant; and the evidence further shows that the appellant was called in for consultation and assistance first by Dr. Fleischer, with the knowledge and assent of the defendant, and that he was present at the surgical operation at the request of the defendant himself. Upon this evidence it seems to us that the court would have been justified in directing a verdict for the plaintiff.

If he was not entitled to have the court direct a verdict in his favor, he was clearly entitled to have the jury instructed as requested in the third instruction asked by him, viz.: "If a physician, at the request of an attending physician, renders surgical services to a patient, even if there be an agreement between the attending physician and the patient that he, the attending physician, shall pay the expense of the surgical services of the consulting physician, the latter, being ignorant of such agreement, is entitled to recover, under an implied contract, from the party to whom and for whom such services were rendered, what the same are reasonably worth." Instead of giving this instruction, or one in substance like it, the learned Circuit judge submitted the case to the jury on the theory that if the defendant himself had reasonable grounds for believing that the plaintiff was in the employ of Dr. Fleischer, and that the plaintiff so understood it, then he could not recover. This instruction is, in substance, that if the plaintiff and defendant had both reasonable grounds for believing that the plaintiff was in the employ of Dr. Fleischer when he performed the ser-

Garrey v. Stadler.

vices for the defendant, then he could not recover. We think there was nothing in the evidence upon which this instruction could be based, so far as the plaintiff was concerned. There is nothing in the facts proven on the trial that tends to show that the plaintiff supposed he was in the employ of Dr. Fleischer. On the other hand, all the evidence tends to show that he understood that he was in the employ of the defendant, and that he had no reason for believing that he was in the employ of Dr. Fleischer. Whatever may have been the belief or understanding of the defendant on the subject, such belief could not release him from liability to the plaintiff for the services performed, in the absence of any evidence tending to show that the plaintiff had knowledge of the contract between him and Dr. Fleischer.

The case of *Shelton v. Johnson*, 40 Iowa, 84, is similar to the one at bar; but the facts set up in the answer, to which a demurrer was sustained in favor of the plaintiff, were more favorable to the defendant than the facts proved in the case at bar. In holding that the facts set out in the answer did not constitute a defense, the court say: "Where a party, knowingly and without objection, permits another to render service for him of any kind whatever, the law implies a promise to pay what the same is reasonably worth. If the plaintiff had been called to visit defendant by one having no pretext of agency or authority to do so, and defendant had, without objection, received the services of plaintiff, the law would imply a contract to pay for them. If this is the rule where no authority whatever is conferred, why is it not also the rule where a limited authority, such as that set forth in the answer, is conferred? The answer admits that Findley was authorized to call plaintiff to defendant's residence for the purpose of consultation. It alleges that the consultation was for the benefit of Findley, the attending physician, and was to be at his expense. It admits also that the plaintiff did not know of this arrangement between defendant and Findley. The understanding between the defendant and his attending physician introduced into the transaction an element unusual and exceptional, viz., that the consultation should be for the benefit, not of the invalid, but of the physician; and as a consequence of this agreement, the promise which the law implies is shifted from the defendant to his physician. Now as the effect of this agreement is to produce results unusual in their nature, the plaintiff ought not in justice

to be bound by it, unless he had knowledge of it." In this case the answer showed that Findley, the attending physician, had been very much criticised for his treatment of the defendant and his family, in which two deaths had occurred while he was treating them, and that Findley proposed the calling in of the consulting physician, at his own expense, for the purpose of showing that his practice was proper and not subject to such criticism; and for that reason the claim made by the defendant; that he should not be charged with the expense of consultation, had a more plausible ground to support it than in the case at bar, where the evidence shows that calling in the services of the consulting physician was solely for the benefit, and necessary for the proper treatment, of the defendant.

A similar ruling was made in a case in the same court, in favor of the services of attorneys who were brought into the case at the request of one of the defendants, who was also an attorney and had agreed to defend the action and pay all attorney's fees. The defendants were all held liable to pay for the services of the assisting attorneys, on the ground that the services were performed for the defendants with their knowledge and consent; the assisting attorneys not knowing of the agreement existing between them and the attorney who was their co-defendant. See *McGrady v. Ruddick*, 33 Iowa, 521.

Whether the rule of liability be as broad as stated by the learned court in the first case above cited, it is certainly broad enough to cover all cases where the service is performed for the personal comfort or convenience of the party with his consent and without objection or notice that such service is to be paid for by some other person. As the law in such case implies a promise to pay what the service is reasonably worth, on the part of the person for whom such service is performed, such implied promise must be overcome by evidence showing that the person performing the service knew that there was a different arrangement for the payment of such service, to which he expressly or impliedly assented.

This rule is peculiarly applicable to the service of a physician. We think we are justified in assuming that it is quite exceptional for the members of that profession to undertake the treatment of their patients on special contracts by which they are to be paid a sum in gross, and by which they bind themselves personally with their patients to pay for any needed assistance in the proper

Schultz v. Chicago and Northwestern Railroad Company.

treatment of the case; and when such a case does occur in the profession, it is, as said by the learned court in the case above cited, an unusual and exceptional case, and one of which another physician called in consultation or otherwise is not bound to inform himself before rendering the required service. If the exceptional contract is to bind the consulting or assisting physician, it must be brought to his knowledge before his services are accepted by the patient; otherwise it can have no weight in determining the liability of the patient to pay for the service performed by such physician. See also upon this subject, *James v. Birby*, 11 Mass. 34, 36 and the other cases cited by the counsel for the appellant in their brief.

BY THE COURT. — The judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

SCHULTZ V. CHICAGO AND NORTHWESTERN RAILROAD CO.

(67 Wis. 616.)

Master and servant — railroad — negligence — coal falling from tender — assumption of risk — co-servants.

A railroad track-walker sued the company for personal injuries by the fall of a lump of coal from a tender on which it was carelessly piled up. His own testimony showed that he knew the habit of thus overloading tenders and had seen lumps of coal on the track. *Held*, that he could not recover, (1), because he assumed the risk; (2) because there was not necessarily any negligence in this manner of piling the coal; (3) because the coal-heavers and firemen were fellow-servants with the track-walkers.

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

Winsor & Winsor, for appellant.

Jenkins, Winkler and Fish & Smith, for respondent.

OTTOX, J. The plaintiff had been in the employment of the defendant company as track-walker from Elroy to Kendall, whose business it was to go over the track and see that every thing was in order, and if any thing was out of order to fix it, or if dangerous, to stop the trains. He had been thus employed about six months,

Schultz v. Chicago and Northwestern Railroad Company.

but had been employed along this portion of the track about other business of the company about four years, and was well acquainted with the passing of the trains and the management of things generally along that portion of the track. On the night of the 22d of April he started about six o'clock in the evening to walk his route or beat from Elroy to Kendall and when he had arrived near Kendall he found a bolt out of place and stopped to fix it; and while so engaged he saw the train coming out of Kendall, and he waited until it came about three lengths of a rail from him, and then he stepped off the embankment and down toward the water of a mill-pond there, about six or seven feet. The track came within a little over three feet from the top of the embankment, and there the bank sloped down to the water, and it was level at the bottom a short distance from the water. While he was thus standing on the fireman's side of the engine he looked into the engine as it passed and saw the fireman doing something in the cab, and when the tender was passing him he saw a dark object fall or was thrown from it, and it struck him in the side and injured him quite severely. He fell down, and was helpless, and was assisted to Kendall. He saw near where he lay a piece of coal about the size of a man's soft hat, and it appeared that that was what hit him, and that probably fell from the tender. He saw that coal on the tender was above the top of it before the train reached him. He had seen pieces of coal lying along the track, and knew that coal sometimes fell from the tender. Kendall was the regular station for loading coal to last to Baraboo. In the course of his business, he had usually met about eight freight trains and three or four passenger trains per day on that part of the track. It was about eight o'clock that evening when the accident occurred, and it was not very dark, but he had a lantern. He had before seen coal above the top of nearly every tender that passed on the road, but had never known coal to fall off in this way before. The same train usually passed him every day. The fireman usually loads at Kendall what he thinks is sufficient coal for the run. This is substantially all the testimony of the plaintiff and other witnesses for him.

The plaintiff sought to prove what had been the customary way of loading coal, as to piling it up above the top of the tender, about that time and for two or three years before. This was objected to, and the objection sustained. At the close of the plaintiff's testimony the Circuit Court granted a nonsuit in the case.

Schultz v. Chicago and Northwestern Railroad Company.

1. Was it error to reject the testimony offered as to the habit or custom of the company in respect to loading the coal so as to be above the tender, or as to piling it up? It is not contended by the learned counsel of the appellant that such evidence was proper for the purpose of showing negligence in this particular case; but it is contended that it was proper to show such general habit or custom for the purpose of showing notice to the company of such common and customary negligence, which ought to have been in some way corrected, and of showing that the company had affirmed, approved and assumed the negligence of its employees in this respect, and made their negligence its own. In other words, that the company had assumed all the responsibility and liability for the risk of such negligence. For such purpose, this evidence would have reacted upon the plaintiff to defeat his action; for the same evidence would have shown his own actual knowledge of such a common risk of his employment, and that he as well as the company had assumed them. If it was negligence in the company to have tacitly allowed the continuance of such a customary way of loading its cars after presumptive notice of it, equally so and more was it negligence of the plaintiff to continue in such a dangerous employment after actual knowledge of it, and he certainly had superior means of knowledge. *Hughes v. W. & St. P. R. Co.* 27 Minn. 141; *P. & C. R. Co. v. Sentmeyer*, 92 Penn. St. 280; s. c., 37 Am. Rep. 684; *Naylor v. C. & N. W. R. Co.*, 53 Wis. 664; *Hobbs v. Stauer*, 62 Wis. 110; *Ballou v. C. & N. W. R. Co.*, 54 Wis. 269; *Leary v. B. & A. R. Co.*, 139 Mass. 584; *Gibson v. Erie R. Co.*, 93 N. Y. 453; s. c., 20 Am. Rep. 552.

The testimony of the plaintiff was that he had seen the tender overloaded (as claimed) in this way often before, and had stepped aside and let the train pass as in this instance, and that he had seen pieces of coal on the track within his route or beat, and that way of loading the tender was nearly always and invariably so. If there was in this way of loading any such risk or hazard or danger to be anticipated or apprehended in this employment, by continuing in it without complaint or objection he assumed such risk and hazard; and he certainly could not recover if he happened at some time to be injured by such a customary mode of loading the tender with coal. First, then, by his own evidence and by the above authorities and the commonly accepted law upon that condition of the case, he ought not to recover, and the nonsuit was proper.

Schultz v. Chicago and Northwestern Railroad Company.

2. Was it negligence of the company, even if they know of such a customary method of loading the tenders on their road? Such an accident had never happened before from such a cause. It was a very strange and almost unaccountable accident. It was common to load the tender in that way, and it may have been actually necessary in order to provide coal enough to last to the next coal station. Is it negligence to pile or heap up the coal above the dead level of the top of the tender? In this way coal had always been carried without any danger of accident. The plaintiff had never expected, feared, or apprehended any danger from it, or he would have been sure to be out of the way when a train passed, or quit the employment of track-walker. Can this court say in this case, as a matter of law, that this way of loading the tender was or is *ipso facto* negligent.

Negligence is a question of law when the facts are undisputed as in this case. It might make a radical change in the size and capacity of the tender or in the distance between coal and wood stations, if the coal or wood must not be piled or heaped up above the level of the top of the tender. It would seem reasonable to put on the tender all the coal or wood it could safely carry, even above the top, and if by chance or by the jarring of the car over a rough road one single piece of coal or stick of wood should fall off and injure an employee who knows all about this usual way of loading the tender, and if he should notwithstanding place himself so near the side of the cars as to be injured by it, it would seem to be a mere mischance or accident, out of the common course of things, and against which the company, in the exercise of common care and prudence or of such care as all other railway companies exercise in such a case, is not required to provide. The act of negligence complained of is the piling of the coal up above the top of the tender. We cannot and dare not say that this was negligence *per se*. The company provided safe machinery, and the cars were managed with care, and the road-bed was perfect, and no complaint is made of any thing else, except that the coal-heaver at the station or the fireman crowned or piled up the coal on the tender in the very way that this plaintiff had always observed, and that all tenders were loaded, and without a single accident from such cause before this. This case, in this respect, falls within the principle of a mere accident, occurring unexpectedly and almost unaccountably from a common course of things in which it had never

Schultz v. Chicago and Northwestern Railroad Company.

happened before and is not likely to happen again, and is attributable to a cause not usually and scarcely ever followed by such a consequence. The case in this respect also falls within the decision of a similar class of cases of unexpected and unusual accidents where no recovery can be had, as in *Morrison v. P. & U. Const. Co.*, 44 Wis. 405; *Steffen v. C. & N. W. R. Co.*, 46 Wis. 259; and *Sorenson v. Menasha P. & P. Co.*, 56 Wis. 338.

For this reason also we think that the nonsuit was properly granted.

3. We do not think that this way of loading the tender with coal, however common or invariable, was notice to the company of such act or neglect as one of danger, hazard or negligence, so as to make the company liable. For that purpose the company must be presumed to know that the act was one dangerous in itself, or from its dangerous consequences or from its liability to injure those persons who should stand near the track of the road. But this the company or anybody else did not know, and could not know until some such unusual accident as this had happened. The company might know that this was the usual method and way of loading the tender, and not be liable. It must also know that it is dangerous in itself to do so, or that it is liable to produce injury to others. But no one ever dreamed of such a consequence as happened to the plaintiff in this instance. In such knowledge as the company had, or was presumed to have had from its usual occurrence, there was no duty involved to discontinue such a way of loading the tender, and from it no liability for its neglect of duty could possibly arise, for the company did not know, and had no reason to know, that it was its duty to discontinue this practice, and did not know that it was unsafe. Aside from this knowledge of the company, the company had not assumed any liability for the acts of its servants, and from such knowledge as the company might be presumed to have had of the practice because it was common and invariable, we do not think the jury would have had any right to find that it had assumed this act or practice of its servants, that was never before found to be hazardous or dangerous.

This car was loaded in this manner by the coal-heaver or fireman, as the co-employees of the plaintiff. Their grade of employment was no higher than his. There was no proof that they so acted as the representatives or under the orders of the company. If there

Schultz v. Chicago and Northwestern Railroad Company.

was negligence in this particular case, it was the negligence of the plaintiff's fellow-servants and not of the company, and the plaintiff therefore was not entitled to recover, according to numerous similar cases in the court, which from their great number need not be specially cited. For this reason, also, the nonsuit was proper.

Many other cases might be cited applicable to this case; as where an employee remains in the business or employment after he obtains knowledge of its risks, he cannot recover for an injury arising therefrom. *Kelley v. C., M. & St. P. R. Co.*, 53 Wis. 74; or as where an employee in a lumber yard is assisting in piling up lumber that is slippery and liable to fall, and that a slight jar would cause to fall upon him, and he is injured by the pile falling, he cannot recover. *Hoth v. Peters*, 55 Wis. 405.

[Minor point omitted.]

BY THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

INDEX.

ACTION

By State.] *See* CONSTITUTIONAL LAW, 590.

AGENCY.

Foreign agent—personal liability.] On a contract of affreightment, executed by a foreign agent, but disclosing the fact of the agency and the name of the principal, the agent is not personally liable. *Maury v. Ranger* (38 La. Ann. 485), 197.

See BANKS, 728; EVIDENCE, 562; NEGOTIABLE INSTRUMENT, 839; PARENT AND CHILD, 875.

ALIENATION.

Restraint on.] *See* WILL, 692.

ANIMALS.

Property — dogs.] No action lies for negligently killing a dog. *Jemison v. Southwestern Railroad* (75 Ga. 444), 476.

ASSIGNMENT.

Double, of chose in action — rights of assignees.] The *bona fide* purchaser of a chose in action, with authority to collect, takes it subject to the claim of one to whom the owner has previously assigned a part interest in it, for a valid consideration. *Fairbanks v. Sargent* (104 N. Y. 106), 490.

See CONTRACT, 598; INSURANCE, 848.

ASSIGNMENT FOR CREDITORS.

- 1. Condition for release—for return of surplus.]** An assignment for creditors, with preferences, providing (1) for the *pro rata* payment of the other creditors in full satisfaction and release, and (2) for the return of any surplus to the assignor, is void on both grounds. *Greeley v. Dixon* (21 Fla. 413), 673.
- 2. Void conditions.]** An assignment for creditors is void for providing that no creditor shall participate unless he accepts his share in full satisfaction, and for not designating a time within which they are to come in, and for providing that the trust shall be administered and closed under the supervision of the assenting creditors. *Collier v. Davis* (47 Ark. 367), 758.

See CONFLICT OF LAWS, 329.

ATTORNEY AND CLIENT.

Deposit of client's money in attorney's name — liability for loss.] Where an attorney deposits his client's moneys in a solvent bank, in his own name in a separate account, but with no indication of the trust, he is liable for loss by the subsequent insolvency of the bank, notwithstanding he was prevented from transmitting the moneys by garnishment proceedings against him. *Naltner v. Dolan* (108 Ind. 500), 61.

ATTORNEY.

Disbarment — city attorney.] The respondent was a salaried attorney of the city and county of San Francisco, having control of all its litigations. During his term of office he appealed from judgments rendered against it in certain cases in which he had no personal knowledge of the questions involved. After the expiration of his term he agreed with the attorney for the adverse parties, for a pecuniary consideration, not to be retained in those cases by the city and county. *Held*, unprofessional conduct for which he should be temporarily disbarred. *In re Cowdery* (69 Cal. 32), 545.
See CRIMINAL LAW, 602; LIBEL AND SLANDER, 574; PARTNERSHIP, 17.

AUCTION.

Evidence to vary condition.] As between the seller and the purchaser of goods sold at auction, evidence is admissible to vary the conditions of the sale publicly stated. *Mitchell v. Zimmerman* (109 Penn. St. 188), 715.

BAGGAGE.

See CARRIER, 468.

BAIL.

See CRIMINAL LAW, 181.

BAILMENT.

Negligence — burden of proof.] In an action for the defendant's negligence in suffering a note given to him for collection to be barred by the statute of limitations, there is no presumption that he was to have compensation, and the burden of proof is on the plaintiff to show his liability. *Kinchloe v. Priest* (89 Mo. 240), 117.

BANKS.

Collections — agency — negligence.] A bank receiving for collection a check on a bank at another place, and intrusting it directly to that bank for payment, is liable to the depositor for loss by the failure of the drawee. *Merchants' National Bank of Philadelphia v. Goodman* (109 Penn. St. 422),

BETTING.

See CRIMINAL LAW, 653.

BIGAMY.

See CRIMINAL LAW, 670.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BOND.

Conditional signing by surety.] Where a public officer procured the signatures of sureties on his official bond on the assurance that he would procure certain others, which he failed to do, the signers cannot evade liability if the obligee had no notice of the condition and the bond was complete in form. *Carroll County v. Ruggles* (69 Iowa, 269), 228.

CARRIER.

1. Baggage — delivery.] The plaintiff travelled a part of the way to her destination by the defendant's railroad, and on the next morning resumed her route by another connecting road, which used the same baggage-room and platform as the first, her trunk remaining in the baggage-room all night, and she retaining the check; before the train on the second road left, an employee of the first took the check, agreeing to place the trunk in proper position for transportation; but on reaching her destination, it was discovered that it had not been put on board the train, and it was never found. *Held*, that the defendant was liable. *Rome Railroad v. Wimberly* (75 Ga. 316), 468.

2. Contributory negligence — passenger on freight train.] A passenger in the caboose of a railway freight train, on the stopping of the train a quarter of a mile short of his destination, got up to walk to the door and was thrown down and injured by the sudden backing of the train. *Held*, that his negligence prevented his recovery of damages. *Harris v. Hannibal and St. Louis Railroad Co.* (89 Mo. 238), 111.

3. Negligence — concurrent.] Where a railway passenger is injured by the concurrent negligence of his carrier and another, the negligence of his carrier is not imputable to him. *Holeab v. New Orleans and Carrollton Railroad Co.* (38 La. Ann. 185), 177.

4. Putting infant trespasser off train.] A boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward in the day-time, on an ascending grade, where it could easily have been stopped, ran upon and killed the child. *Held*, that the railroad company was liable. *Indianapolis, etc., Railway Co. v. Pitzer* (109 Ind. 179), 387.

5. Railroad — free pass — limitation of liability.] *Annas v. Milwaukee and Northern Railroad Company* (87 Wis. 46), 848.

6. — passenger riding on engine.] One who by permission of the engineer of a freight train, acting as conductor, takes passage on such train and pays fare, is entitled to the privileges of a passenger, although the engineer has been forbidden to receive passengers on the train, provided the

CARRIER — *Continued.*

passenger does not know of such rules. *Hanson v. Mansfield Railway and Transportation Company* (88 La. Ann. 111), 162.

7. It is not negligent in such passenger to ride on the locomotive by direction of the engineer-conductor. *Id.*
8. Sleeping car company — duty as to passengers' effects.] *Lewis v. New York Sleeping Car Co.* (143 Mass. 269), 185.
See RAILROADS, 207.

CHATTEL MORTGAGE.

See MORTGAGE, 230.

CIVIL DAMAGE ACT.

Contributory negligence.] In an action by a wife under the civil damage act, for furnishing intoxicating liquors to her husband, it is not proof of contributory negligence to show that she was in the habit of letting him have portions of his wages previously deposited with her, having reason to believe he would spend them for such drink. *Huff v. Aultman* (69 Iowa, 71), 218.

CONFLICT OF LAWS.

1. **Assignment for creditors.]** An assignment for creditors, with preferences, made in New York by a debtor living there, and valid there, will be held valid in Michigan although the Michigan statute prohibits preferences. *Butler v. Wendell* (57 Mich. 62), 329.
2. **Death by negligence.]** An action cannot be maintained in Massachusetts against a railroad corporation operating its road as a continuous line in that State and in Connecticut under the laws of both, for the death of a person caused by the negligence of the corporation in Connecticut, the laws of the latter State not affording the like remedy. *Davis v. New York & New England Railroad* (143 Mass. 301), 188.

CONSTITUTIONAL LAW.

1. **Action by State — waiving tort and suing in assumpsit.]** Money was deposited in bank by a tax-collector, to the credit of "I. H. Vincent, treasurer," and checked out by him in the purchase of exchange on New York, the draft being made payable to himself as treasurer, and indorsed in the same way. The indorsee knew that Vincent was State treasurer. *Held*, that the indorsee was chargeable with notice of the official character in which the treasurer held the funds, and applying the money in payment of an individual indebtedness of the treasurer to him, he became liable to the State in an action for money had and received. *Wolfe v. State* (79 Ala. 201), 590.
2. **Contempt — refusal to produce books before legislative committee.]** A standing committee on elections of a house of the legislature, with power to send for persons and papers, may command a clerk of a court of common pleas, having custody of a poll-book, to produce it on an investigation, although this may involve the removal of the book to another county than that of his office, and on his refusal such house may commit him for contempt. *Ex parte Dalton* (44 Ohio St. 142), 800.

CONSTITUTIONAL LAW — *Continued.*

3. **Exemption — wages — waiver.**] The constitutional exemption of wages from garnishment may not be waived as to all future wages. *Green v. Watson* (75 Ga. 471), 479.
4. **Grant by city of railway privilege in streets.**] An irrevocable grant, by a city, of the exclusive privilege to construct and operate a street railway, is unconstitutional. *Birmingham & Pratt Mines Street Railway Co. v. Birmingham Street Railway Co.* (79 Ala. 465), 615.
5. **Impairing contract.**] A judgment for the repayment of money paid by mistake is not upon contract, and is protected by the Federal constitutional provision forbidding the enactment of laws impairing the obligation of contracts. *State v. City of New Orleans* (38 La. Ann. 119), 168.
6. **Vested rights.**] A change in the law prescribing the order of payment of the debts of a decedent does not impair the obligation of a contract nor a vested right. *McLure v. Melton* (24 S. C. 559), 272.
7. **Jurisdiction — as to delivery of election returns.**] Where election returns, as required by law, are directed to the speaker of the house of representatives, in care of the secretary of State, and are to be delivered by the secretary to the speaker, injunction will not issue to restrain the secretary from delivering them, on the allegation that they are wrongful and illegal. *Smith v. Myers* (109 Ind. 1), 375.
8. **Municipal ordinance — regulation of railroads.**] A city ordinance requiring street railway companies to report quarterly the number of passengers carried is valid. *City of St. Louis v. St. Louis Railroad Co.* (89 Mo. 44), 82.
9. **Ordinance prohibiting street walkers.**] A city ordinance prohibiting disreputable women from standing or loitering about the streets or stores at night, unless on unavoidable business, is valid. *Braddy v. City of Milledgeville* (74 Ga. 516), 448.
10. **Regulation of laundries.**] Under a statute authorizing a city to prohibit the erection of wooden buildings within limits where streets have been graded, it is competent to ordain that no laundry shall be carried on without special permit, unless in a brick or stone building. *Matter of Yick Wo* (68 Cal. 294), 12.
11. **Regulation of physician.**] The legislature may regulate the practice of medicine and surgery, and prescribe the qualifications of applicants for license. *Eastman v. State* (109 Ind. 278), 400.
12. **Tax on inheritances.**] A tax on gifts, legacies and collateral inheritances is constitutional. *Matter of McPherson* (104 N. Y. 306), 502.
13. **Sunday.**] See CRIMINAL LAW, 768.

CONTEMPT.

See CONSTITUTIONAL LAW, 800; MUNICIPAL CORPORATION, 158.

CONTRACT.

1. **Illegal — lottery.**] The owner of property, who disposes of it by lottery, may recover it from the drawer. *Martin v. Hodge* (47 Ark. 378), 768.

Delaware, Lackawanna and Western Railroad Company v. Sanderson.

in support of the conclusion "that there was such a severance of the surface from the underlying strata as created a divided ownership in these distinct portions of the land."

It may not be amiss to remark some of the points of the plaintiffs' argument. At present no question arises respecting the grantors' security for the purchase-money, nor of their power to subject their right under the deed to the lien of a mortgage. Nor is it a part of the case that the great body of coal lands in the Commonwealth are held under similar instruments. And if they are so held the real question remains as to the nature of the estate vested in the grantees.

In this instrument the operative word of the grantee is "lease," which signifies to grant the temporary possession of the subject, but in another part it is provided how long that possession shall continue. "In consideration of the grant or lease aforesaid" the grantee or lessee agrees to pay a certain sum per ton; the mode of ascertaining the number of tons, the times of making payment, and the minimum quantity to be paid for annually, are well defined. The money to be paid is called "payment," "price or royalty," and "royalty," but the meaning would be the same were the price to be paid for the coal called "rent." The stipulated remedies in case of default in payment are consistent with either a sale or lease, but were the instrument a lease some of them would exist if not therein expressed. When the parties omit to name a term, do not create a lease at will, nor a lease for life, though much of their contract is expressed in words peculiar to a lease, the whole instrument must be taken into view to ascertain the intent. Where it is clear that the owner of a tract of land grants the right to take all the coal beneath the surface, and the grantee obligates himself to mine and remove all said coal and to pay a certain price per ton each month for all coal mined, not less than a named quantity to be mined and paid for every year, the contract to be binding until all the coal under the tract is mined, and the rights, covenants and obligations are made binding on the parties, their heirs and assigns, and executors or administrators, there is an actual sale of the coal. It is none the less a sale, if the parties called the deed a lease, and styled themselves lessor and lessee, and contracted that in case of non-payment of the "royalty" the grantor should have the right of distress, or at his option the right to forfeit the grant. A deed on such terms is not a lease at will, nor for a term of years, nor for life. It cannot be limited to the life of the grantee, for should all

Delaware, Lackawanna and Western Railroad Company v. Sanderson.

the coal not be mined at the time of his death, his rights and obligations do not die with him.

Leases are generally for a term of years. If for a long term, as a hundred years, though of greater value than if for the life of the grantee, the estate is inferior. The entire body of coal under a tract of land may be embraced in a lease, and the term be so long that in all probability the lessee will mine the whole of the coal. Yet a term of years is a chattel, a transient interest in the land. A lease for the life of the lessee vests in him a freehold. A lease of a mine, whether for a term of years or for life, implies the possibility, if not the probability of its reversion. That the mineral may be partly or wholly exhausted before the end of the term is a result involved in the contract. It is not pretended that the instrument in question is a lease for life. No particular period is named for the duration of a tenancy. Then if it is a lease the tenancy is from year to year. Such tenancy is contrary to the plain intent. The subject of the grant is coal, nothing else save some necessary incidents for mining, and when the grantee shall have performed his covenants there can be no reversion.

It may have been believed, as the plaintiffs allege, that instruments of this character, by settled construction, are mere leases, but we have not been advised of the authority settling such construction. In support of this allegation it is said that these instruments have been recognized as leases in the body of our statutes, and reference is made to the act of April 27, 1855, P. L. 369, and its supplement of April 3, 1868, P. L. 57, relative to the mortgaging of leaseholds; but that statute expressly applies to "every lessee for a term of years." It embraces no lease that vests a freehold. Nor an absolute grant of the whole body of mineral. Again it is averred that judicial recognition of such instruments as leases has been distinct and emphatic, and reference is made to *Miners' Bank v. Heilner*, 47 Penn. St. 452; *Effinger v. Lewis*, 32 Penn. St. 367; *Offerman v. Starr*, 2 Penn. St. 394; s. c., 44 Am. Dec. 211; *Griffin v. Fellows*, 82 Penn. St. 114; *Greenough's Appeal*, 9 Penn. St. 18; *Trout v. McDonald*, 83 Penn. St. 144, and *Winton's Appeal*, 97 Penn. St. 385. Each of the first four of these cases related to a lease expressly for a term of years, *Greenough's Appeal* to a lease determinable on one month's notice by either party, and in each of the last two cases no question was made respecting the nature of the instrument, and the report does not show that it was not a

was all said, the latter part of their expressions is sufficient in the judgment of the court to enable the jury to find a positive promise." The jury so found.

This subject has been so frequently and elaborately discussed that we may be excused from going over the ground again at length, and it is sufficient to indicate the rule as laid down by the authorities, and then apply it to the facts of this case. In *Miller v. Baschore*, 83 Penn. St. 356, it was said: "In order to effect such a result there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay." In the later case of *Pabner v. Gillespie*, 95 Penn. St. 340; s. c., 40 Am. Rep. 657, it was held that the promise to pay need not be express. It was said by Justice MERCUR: "It is not essentially necessary that the promise be actual or express, provided that the other necessary facts are shown. A clear, distinct unequivocal acknowledgment of the debt is sufficient to take a case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise, without its having been actually or expressly made. There must not be uncertainty as to the particular debt to which the admission applies."

The meaning of which is that where the debt is identified beyond all doubt, and distinctly acknowledged, the law will imply a promise to pay it; but it is not a subject for a jury to guess at.

In the case in hand the debt was not sufficiently identified. In the conversation testified to by the plaintiff there is not a word as to the date of the note, its amount, or the balance due thereon. The note itself was not produced, and there is no evidence that the plaintiff had it with him. There is no certainty as to what debt or what note was referred to; any uncertainty either in the acknowledgment or identification of the debt is fatal. *Burr v. Burr*, 2 Casey, 284. In that case there was one actual payment on account, but this court held the debt was not identified. The evidence there was as follows: "Mother says, can thee let me have a little interest money on that note which I hold of thine?" He said, "how much would thee like, mother?" She said, "four or five dollars, and he gave her seven." There was no evidence of the existence of any other note between the parties, yet it was held that the acknowledgment was insufficient. The present case is certainly

Landis v. Roth.

no stronger, and as *Burr v. Burr* has been constantly followed to the present time, we are constrained to reverse this judgment.

Judgment reversed and a *venire facias de novo* awarded.

NOTE BY THE REPORTER.—As to acknowledgment and promise to a stranger. *Stewart v. Garrett*, 65 Md. 392; s. c., 57 Am. Rep. 333; *De Freest v. Warner*, 98 N. Y. 217; s. c., 50 Am. Rep. 657; *Bachman v. Roller*, 9 Baxt. 409; s. c., 40 Am. Rep. 97; *Sibert v. Wilder*, 16 Kans. 136; s. c., 22 Am. Rep. 280; *Kirby v. Mills*, 78 N. C. 124; s. c., 24 Am. Rep. 460.

As to payment by joint debtor. *Walters v. Kraft*, 23 S. C. 578; s. c., 55 Am. Rep. 44; *Parker v. Butterworth*, 46 N. J. L. 244; s. c., 50 Am. Rep. 407; *Kallenbach v. Dickinson*, 100 Ill. 427; s. c., 39 Am. Rep. 47; *Miller v. Miller*, Mac A. & Mack. 109; s. c., 48 Am. Rep. 738; *Burgoon v. Bixter*, 55 Md. 384; 39 Am. Rep. 417; *Bush v. Stowell*, 71 Penn. St. 208; s. c., 10 Am. Rep. 694.

Promise of one joint debtor. *Campbell v. Brown*, 86 N. C. 376; s. c., 41 Am. Rep. 464; *Elder v. Dyer*, 26 Kans. 604; s. c., 40 Am. Rep. 320.

Memorandum among papers of debtor. *Abercrombie v. Butts*, 72 Ga. 74; s. c., 53 Am. Rep. 832; *Allen v. Collins*, 70 Mo. 138; s. c., 35 Am. Rep. 316.

As to payment by assignee. *Whitney v. Chambers*, 17 Neb. 70; s. c., 52 Am. Rep. 398.

Conditional promise. *Parker v. Butterworth*, 46 N. J. L. 244; s. c., 50 Am. Rep. 407; *Richardson v. Bricker*, 70 Colo. 58; s. c., 49 Am. Rep. 844; *Pierce v. Seymour*, 52 Wis. 272; s. c., 38 Am. Rep. 737; *Morton v. Shepard*, 48 Conn. 141; s. c., 40 Am. Rep. 157; *Abrahams v. Swann*, 18 W. Va. 274; s. c., 41 Am. Rep. 692; *Chambers v. Rubey*, 48 Mo. 699; s. c., 4 Am. Rep. 318.

Acknowledgment sufficient without promise. *Palmer v. Gillespie*, 95 Penn. St. 340; s. c., 40 Am. Rep. 637.

Must be unconditional and in writing. *Pierce v. Seymour*, 52 Wis. 272; s. c., 38 Am. Rep. 737.

Promise or payment by partner after dissolution. *Tale v. Clements*, 16 Fla. 339; s. c., 26 Am. Rep. 709; *Mayberry v. Willoughby*, 5 Neb. 368; s. c., 25 Am. Rep. 491; *Mix v. Shattuck*, 50 Vt. 421; s. c., 28 Am. Rep. 511; *Beardsley v. Hall*, 36 Conn. 270; s. c., 4 Am. Rep. 74; *Merritt v. Day*, 38 N. J. L. 32 s. c., 20 Am. Rep. 362.

Payment by creditor out of collateral. *Sornberger v. Lee*, 14 Neb. 193; 45 Am. Rep. 106; *Brown v. Latham*, 58 N. H. 30; s. c., 42 Am. Rep. 568.

Payment by principal — effect on surety. *Green v. Greensboro Female College*, 83 N. C. 449; s. c., 35 Am. Rep. 579; *Knight v. Clements*, 45 Ala. 89; s. c., 6 Am. Rep. 693; *Schindel v. Gates*, 46 Md. 604; s. c., 24 Am. Rep. 526.

Payment by surety out of principal's funds. *McConnell v. Merrill*, 53 Vt. 149; s. c., 38 Am. Rep. 663.

Payment by co-surety. *Cocke v. Hoffman*, 5 Lea, 105; s. c., 40 Am. Rep. 23.

Payment by administrator or executor. *County of Vernon v. Stewart*, 64 Mo. 408; s. c., 27 Am. Rep. 250; *Shreve v. Joyce*, 36 N. J. L. 44; s. c., 13 Am. Rep. 417; *Seig v. Acord's Err.*, 21 Gratt. 365; s. c., 8 Am. Rep. 605.

The doctrine of the principal case seems peculiar to Pennsylvania, Missis

issippi, South Carolina, and possibly Maine. It was laid down in *Miller v. Baschore*, 83 Penn. St. 356; s. c., 24 Am. Rep. 187.

In *Abrahams v. Swann*, 18 W. Va. 274; s. c., 41 Am. Rep. 692, it was held that parol evidence was competent to identify the debt.

In *Morrell v. Ferrier*, 7 Colo. 21, the court said: "Moreover it is laid down as a general rule, that where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is upon the defendant to show that it related to another debt, either wholly or in part. Wood Limitation of Actions, 162; Angell Limitation of Actions, § 238; 2 Greenl. Ev., § 441; *Carr's Adm'r v. Hurlbut's Adm'r*, 41 Mo. 264; *Whitney v. Bigelow*, 4 Pick. 119; *Cook v. Martin*, 29 Conn. 63. If this rule be a sound one in general application, it certainly would apply with peculiar force in a case where but one item of indebtedness is in suit, and where one matter of indebtedness only is referred to in the acknowledgment or new promise."

In *Trustees v. Gilman*, 55 Miss. 148, the debtor wrote: "It would suit my convenience to execute my note for the balance due for rent." Held, too vague and indefinite. "It does not identify the debt. It mentions a balance due for rent, but does not state when, nor from what, nor to whom the rent accrued, nor what the balance was. To allow all these things to be proved by parol would produce the evil the statute 'was intended to prevent.'" This was followed in *Eichford v. Evans*, 56 Miss. 18, where the writing was: "I wrote to Mr. McKnight about the first of this month, to know how I should send the money, and have not heard from him. I am going to Aberdeen to-morrow, and will send \$50, which is all I can possibly spare at present." The court said: "The writing must identify the debt to which it relates, with such definiteness as to the amount due, and the creditor, that nothing important is left open to further testimony."

In *Robbins v. Farley*, 2 Strob. 848, it was held that the acknowledgment "must specify or plainly refer to some particular demand or cause of action." So a statement that "the plaintiff was to receive compensation for his services," and that "she had never paid him any thing," was held insufficient.

In *Pray v. Garcelon*, 17 Me. 145, an admission "that he was owing the plaintiff something, and it ought to be settled," was held insufficient. "When it does not refer to any particular claim, and none is at that time produced, no promise can be implied to settle or pay any particular demand."

In *Bell v. Morrison*, 1 Pet. 365, it was held that "the admission of the existence of an unliquidated account on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the parties understood the balance to be, would not establish any particular subsisting debt," and would be insufficient.

Wood says (Limitation of Actions, 154): "It is not essential that the amount of the debt should be stated or even referred to. It is sufficient if the acknowledgment admits sufficient to be due upon a specific claim, and parol evidence is admissible to prove the amount; and the same is also true as to the nature of the indebtedness. But it must be shown unmistakably to relate to the particular debt or demand, which is sought to be revived by it, or the

Landis v. Roth.

acknowledgment must be attended by circumstances which will enable a jury to ascertain definitely what debt was intended." "The acknowledgment must appear or be shown to relate to the debt, which is the cause of action, but will be presumed to refer to that proved by the creditor, unless another is shown to exist by his evidence or that of the debtor, because if there is no other debt there is no need of proof, and if there is, the burden rests with him who maintains the affirmative." Wood Lim. Act. 156, note.

In *Abrahams v. Swann*, 18 W. Va. 274; s. c., 41 Am. Rep. 692, it was held that parol evidence was admissible to identify the debt.

"If there be words of acknowledgment or promise, without declared reference to the debt in question, it is for the jury to determine, from the circumstances in evidence, whether reference was had to the debt sought to be recovered." *Whitney v. Bigelow*, 4 Pick. 412. To the same effect, *Beal v. Neuil*, 4 B. & Ald. 571; *Frost v. Benough*, 1 Bing. 266; *Lee v. Wyse*, 35 Conn. 384; *Shaw v. Newell*, 1 R. I. 498.

In *McCahill v. Mehrbach*, 37 Hun, 504, a letter referring to a bill which the writer owed for services, and a promise to see the creditor and show him what he owed him and to pay it, held sufficient.

In *Barnard v. Bartholemew*, 22 Pick. 291, the court said: "However correct the position may be, that where there are various demands subsisting between the parties, it is incumbent on the plaintiff to show clearly to which of them the acknowledgment refers, and in case of the existence of two distinct claims, one of which was collectible by law, and the other barred by the statute of limitations, it might well be presumed, in the absence of all evidence applying it specifically, that the acknowledgment applied to the one legally collectible, rather than to that which was barred by the statute of limitations, yet in the present case this objection does not seem properly to arise, because the account of the plaintiff to which the new promise is to be applied is one continuous demand, being the book account of the plaintiff extending through a series of years, with credits to the defendant, and as to which there are no rests, nor have there been any balances struck between the parties during the period of the charges. The new promise may under the circumstances of this case be properly applied to the entire account on the books of the plaintiff."

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

NEELLY V. LANCASTER.

(47 Ark. 175.)

Marriage — tenancy by curtesy.

A statute giving married woman the exclusive ownership and control of their real estate does not abolish the right of tenancy by curtesy.

EJECTMENT. The opinion states the case.

W. N. May and Hall & Carter, for appellant.

Davis & Bullock and Jacoway & Jacoway, for appellees.

COCKRILL, C. J. The action in this case is ejectment. Mary Jane Wicker, acquired title to lands in the controversy by descent from her father in 1861. In 1881, being still seised in fee of the lands, she intermarried with John L Lancaster, the appellee. A child, capable of inheriting the estate, was born alive of this marriage, and in 1883 the wife died without living issue, and without making or attempting to make any disposition of the land. The husband continued in possession, when the appellant, who is admitted to be the vendee or the rightful heir at law, brought this action against him. The appellee, who is the husband, in his answer set forth the facts substantially as stated. A demurrer to

 Neely v. Lancaster.

the answer was overruled, the plaintiff submitted to the judgment and appealed.

The question is, has curtesy been abolished by the married woman's enabling provisions contained in the Constitution and statutes. Art 9, § 7, of the Constitution of 1874 is as follows:

"The real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her, the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband."

Section 4624, Mansfield's Digest, which is taken from the act of April 28, 1873, declares that the property of a married woman, together with the rents and profits thereof, whether acquired before or after marriage, "shall notwithstanding her marriage be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference and control of her husband or liable for his debts."

Curtsey has not been the subject of legislative enactment in this State, and the common law upon that subject prevails, except as modified or changed by the provisions above quoted. They contain no express exclusion of the husband's marital rights in the deceased wife's property, and if the incidents of marriage as recognized by common law are abrogated by them, it is because the rights which they secure to the wife are inconsistent with the husband's common-law rights. To the extent of the inconsistency between the positive provisions of the law and the rules of the common law the latter must of course yield and give place to the former. That the wife may hold her lands to her separate use, free from the interference of her husband and his creditors, is plain from the terms of the written law. In the absence of regulating statutes, or constitutional provisions, she would not enjoy these rights, for the immediate effect of coverture would be to invest the husband with the usufruct of her real estate, and upon the birth of issue capable of inheriting the estate, he would take an enlarged life interest in it, and would become what was termed a tenant by the curtesy initiate, with power to convey his estate without the wife's concurrence. That it was the purpose of the provisions quoted to abolish this feature of the tenancy by the curtesy, and thereby exclude the

rights of the husband during coverture, their terms leave no room to doubt. *Hitz v. Nat. Bank*, 111 U. S. 729-31.

The same result was easily reached before the enactments referred to, by a conveyance to the wife, or to a trustee, for her sole and separate use; and the intention of the grantor in such conveyances to modify or totally exclude the husband's marital rights, as gathered from the language employed, was the test of the interest that he acquired in the lands so held by his wife. It was always admitted that the question, in courts of equity at least, was one not of power to exclude the ordinary marital rights of the husband, but of intention. It accordingly became a settled rule that if a legal or equitable estate of inheritance was limited simply to the separate use of a married woman, no intention was manifested to exclude the husband's ultimate estate, and upon issue born alive and death of the wife, he took his curtesy out of it. The fact that the rents and profits were expressly secured to the wife's separate use and the estate in terms exempted from liability for the husband's debts, it is said, did not alter the rule. And the same was true of a like estate settled upon the wife, or in trust for her, with power to convey or to direct by will or otherwise the person to whom the land should be conveyed, if at her death the power remained unexecuted. The cases all concede that the intention of such conveyances to cut off the husband's rights after the death of the wife must in some form be expressed or clearly implied to have that effect. This was ordinarily done either by stipulating that the husband should not be tenant by the curtesy of the lands conveyed, or else by passing the property immediately upon the wife's death to her heirs or appointee. *Cushing v. Blake*, 30 N. J. Eq. 689; *Stokes v. McKibben*, 13 Penn. St. 267; *Carter v. Dale*, 3 Lea, 710; s. c., 31 Am. Rep. 660; *Tremmel v. Kleiboldt*, 75 Mo. 255; *Frazer v. Hightower*, 12 Heisk. 94; *Morgun v. Morgan*, 5 Madd. 410.

If the settlement or trust deed to the wife's separate use did not plainly exclude the husband's participation after the wife's death, the restriction was construed by the courts to extend to the period of coverture only, and as the matter of his total exclusion was a thing to be accomplished merely by the expression of the intention, the conveyance was not construed to divest the husband's rights further than the terms strictly required, and words of doubtful import were not permitted to have that effect.

The provisions of the statute law restricting the marital rights

of the husband stand upon a like footing and have been so likened and construed in most of the jurisdictions where the question has arisen, the statutory or constitutional provision being held to occupy the place of the conveyance which created the separate use.

The interest of the wife under the enabling acts is not essentially different from that which subsists in relation to her separate estate when created by settlement or deed of trust. It is declared by our law to be her sole and separate property, subject to be conveyed or devised by her, as though she were a *feme sole*, and the language of the law may have full effect as like language in a deed would have without impairing the right of the husband in the enjoyment of the estate after the death of the wife. It protects her estate during her life; it does not at her death purport to affect the law of succession. There is no reason of public policy which requires that the law should be differently construed, and the common-law incidents of marriage are swept away only by express enactment or necessary implication. *Bertles v. Nunan*, 92 N. Y. 160; s. c., 44 Am. Rep. 361; *Robinson v. Eagle*, 29 Ark. 202.

If the framers of the law intended a different construction it would have been easy to accomplish it either by expressly abolishing curtesy, or by directing a different succession on the death of the wife. But under the provisions of the law quoted, and the construction that we have heretofore placed upon it, whatever interest the husband may acquire in the lands of his wife by marriage may be swept away by her subsequent conveyance or devise of them. *Bagley v. Fletcher*, 44 Ark. 153; *Milwee v. Milwee*, 44 Ark. 112; *Roberts v. Wilcoxson*, 36 Ark. 355.

In the same manner could she defeat the possibility of curtesy in her separate estate before the statute, by conveying or causing it to be conveyed away in pursuance of a power granted to her in the instrument.

The rule therefore under our law is, and it is the established doctrine under similar laws, with few exceptions, that while the husband is excluded during the wife's life from the control of or interference with her separate real estate, yet the right of curtesy is left to him in so much of it as remains undisposed of at her death. Kelly Cont. Mar. Women, 94-95; 1 Bish. Mar. Women, §§ 147, 150; Schouler Husb. and Wife, § 423; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Porch v. Fries*, 18 N. J. Eq. 204; *Prall v. Smith*, 31 N. J. L. 244; *Hatfield v. Sneden*, 54 N. Y. 280; *Bertles v. Nunan*, 92 N. Y.

Western Union Telegraph Company v. Cobb.

160; s. c., 44 Am. Rep. 361; *Martin v. Robson*, 65 Ill. 129; s. c., 16 Am. Rep. 578; *Cole v. Van Riper*, 44 Ill. 58; *Leggett v. McClelland*, 39 Ohio St. 624; *Hauck v. Ritter*, 76 Penn. St. 280; *Stewart v. Ross*, 50 Miss. 776; *Houston v. Gassell*, 7 Jones, 161.

In the case at bar, upon the death of the wife, the estate vested in her heir subject to the intervening particular estate of the appellee as tenant by the curtesy. He therefore holds an estate in the lands for his life, and the plaintiff is not entitled to the possession.

Let the judgment be affirmed.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY v. COBB.

(47 Ark. 344.)

Telegraphs—limitation of liability—statutory penalty.

A condition on a telegraph blank that the company shall not be liable for any claim of damages unless presented within sixty days, does not relieve from a statutory penalty for negligent delay in transmitting or delivering messages.

ACTION for statutory penalty. The opinion states the case. The plaintiff had judgment below.

U. M. & G. B. Rose, for appellant.

George H. Sanders and Joseph W. Martin, for appellee.

SMITH, J. This action was to recover the statutory penalty of \$100 for negligent delay in the delivery of a telegram. The defense was that the plaintiff had not exhibited his demand within sixty days from the time he sent the message. There was a jury trial and the plaintiff had a verdict and judgment.

The message was received for transmission, subject to the following condition, which was printed on the blank form furnished by the company:

"The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message."

And it was admitted that the plaintiff had made no claim before bringing his action which was six months after the message was sent.

Western Union Telegraph Company v. Cobb.

The rejection of the following prayer is the only error assigned here: "If you find that the plaintiff's message was written upon a telegraph blank upon which was printed a condition exempting the company from liability unless a demand in writing was presented within sixty days after the sending of the message, and if you find that no demand in writing was presented by the plaintiff within that time, you will find for the defendant."

In *W. U. Tel. Co. v. Jones*, 95 Ind. 228; s. c., 48 Am. Rep. 713, this point was ruled in favor of the telegraph company. It was said that "claims" is a word of very extensive signification, embracing every species of legal demand; that the word "damages" means that which is assessed in the plaintiff's favor as the amount of his recovery; and that the penalty given by the statute is in this sense damages, it being recoverable not by public prosecution, but by a civil action in the name of the sender of the message, in which the public has no interest.

But with due deference to that learned court, we were unable to assent to its conclusion or its train of reasoning. The notice for which the company stipulated was a claim for damages. By damages we understand the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory they are precisely commensurate with the injury received, except in the case of exemplary damages, or smart money, where some element of fraud, malice, gross negligence, or oppression, enter into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery. Field Dam., § 2; 2 Greenl. Ev., § 223; Bouvier Law Dict., *sub nom* Penalty.

As the object of the statute is not to recompense the plaintiff for the actual damage he has suffered, but to quicken the diligence of telegraph companies in the transmission of dispatches, it follows that this cannot be considered an action for damages. The plaintiff does not seek reparation proportioned to the loss or inconvenience to which he has been subjected; but to recover a penalty, the amount of which is fixed by statute, regardless of the fact whether his loss be great or small. He neither alleges, nor proves, actual damages; nor was it necessary to do so. *L. R. & Ft. S. Tel. Co. v. Davis*, 41 Ark. 79; *W. U. Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 774; *W. U. Tel. Co. v. Adams*, 87 Ind. 598; s. c.,

Collier v. Davis.

44 Am. Rep. 776; *W. U. Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692.

Nor can the statutory penalty be considered as in the nature of liquidated damages. This phrase is confined to cases where the extent of the damages has been determined by anticipatory agreement between the parties.

The only claim, to notice of which the company was entitled under the clause in question, was a cause of action sounding in damages—not debt for a penalty. The plaintiff had no such claim to present. As the message related to a family matter, it is probable the failure to deliver promptly caused no pecuniary detriment. The necessity for speedy information may exist equally in both cases, viz., to enable the company to ascertain the true cause of the miscarriage, before time has obliterated the facts from human memory. But the language of the stipulation does not cover both cases; and it will not be presumed the parties intended something they have not expressed.

Judgment affirmed.

COLLIER V. DAVIS.

(47 Ark. 387.)

Assignment for creditors — void conditions.

An assignment for creditors is void for providing that no creditor shall participate unless he accepts his share in full satisfaction,* and for not designating a time within which they are to come in, and for providing that the trust shall be administered and closed under the supervision of the assenting creditors.

REPLEVIN. The opinion states the case. The defendant had judgment below.

Jacoway & Jacoway, for appellant.

Hall & Carter, for appellee.

SMITH, J. McGuire, in 1884, made an assignment for the bene-

* See *Greely v. Dixon*, ante, 678.

fit of his creditors. The deed, after reciting that the maker is indebted in a sum far beyond his ability to pay, conveys to the trustee certain goods, wares and merchandise, which are particularly described in an accompanying schedule, and all the debtor's choses in action. The trustee is empowered to sell the goods, on the best terms he can, consistently with the statute, to collect the debts, and apply the proceeds ratably among the creditors. But no creditor is to participate in the distribution of the assets, unless he will accept his share in full satisfaction of his claim. And the assignment is to be settled and closed up under the directions of the creditors who assent to the same.

The assignee filed his inventory and bond in the proper court, took possession, and notified creditors of the date, terms and conditions of the assignment, as well as of assets and liabilities. A majority in number and value of creditors promptly expressed their acquiescence in the arrangement; but four creditors sued out attachments. Under these writs the sheriff seized the goods. The assignee brought replevin, and on a trial before the court without a jury, the assignment was declared void and the defendant had judgment.

The only evidence introduced, besides the deed and schedule, was an agreed statement of facts. From this it appeared that McGuire was insolvent, at the time of the assignment, and in such confirmed ill health that he had despaired of his life. The assignment included all of his property which was subject to execution. The claims of assenting creditors aggregated \$800.87, while those of attaching creditors were \$779.19. The assignee had, by consent of all parties in interest, sold the goods, and the net proceeds in his hands, after deducting all expenses, were \$612.18; for which sum, it was agreed, judgment might be rendered against him and his sureties in the replevin bond, if the court should find that the defendant was entitled to a return of the goods.

As the deed is in all substantial respects, a copy of the one which is set out in *Clayton v. Johnson*, 36 Ark. 406; s. c., 38 Am. Rep. 40, we are under the necessity of re-examining the grounds of that decision. It is always a misfortune for a court to change front on a question which may affect property rights acquired since the rule was announced. And it is sometimes doubtful whether more mischief will be produced by adhering to an error, or by retracting it. The case has stood for more than five years, although it was never

satisfactory to the profession. It is however indefensible in principle, and it was decided against the clear weight of authority.

In that case the single objection that was raised below, or considered here, was to the provision that no creditor should participate in the assets unless he would accept his share in full satisfaction of his claim. No directions were given for the disposition of any surplus after satisfying the creditors who acceded to these terms. And it was held this did not vitiate the assignment.

It seems to be admitted, in the reasoning of the court, that if the debtors had expressly reserved to themselves the surplus this would have been fraudulent. It is said: "There being no statute in this State prohibiting it, there is nothing in the general statute against fraudulent conveyances which can be construed to prevent a debtor from assigning all of his property, without reservation or benefit to himself, to a trustee for the payment of his debts, with a stipulation for a release."

Now, if no disposition of the surplus is made, a trust results to the maker by implication of law. And so far as the validity of the instrument is concerned, we can perceive no solid distinction between an express and an implied reservation. In one case, as much as the other, the assignment hinders and delays creditors in their remedies and endangers the ultimate collection of their debts. It puts the property beyond the reach of judgments and executions, into the hands of an assignee, chosen not by themselves, but by the debtor. It is locked up until the trusts of the deed are satisfied, and whatever remains is returned to the debtor in money — a form which is ordinarily intangible and inaccessible. Accordingly, those courts which condemn express reservations of the surplus have uniformly, so far as our researches extend, held that implied reservations are equally as bad. *Dana v. Lull*, 17 Vt. 390, *Malcolm v. Hodges*, 8 Md. 418; *Bridges v. Hinde*, 16 Md. 104; *Whedbee v. Stewart*, 40 Md. 414; *Atkinson v. Jordan*, 5 Ohio, 178; s. c., 24 Am. Dec. 281; *Henderson v. Bliss*, 8 Ind. 100.

In New York, and perhaps in every other jurisdiction where the question has arisen, except those mentioned in *Clayton v. Johnson*, the invalidity of assignments, stipulating for a release as a condition of receiving any benefit under the assignment, has been established. And it is a remarkable fact that in an opinion prepared by the late chief justice, the drift of the decisions on this subject in several States has been totally misapprehended. Having himself a high

Celher v. Davis.

reneration for precedents, no judge was ever more diligent in searching for them, or more careful in weighing them, or more accurate in stating the result of them.

The Alabama cases do not sustain the position assumed by the court. Take for instance, *West v. Snodgrass*, 17 Ala. 549. The head-note, which correctly summarizes the principle decided, is as follows: "A deed of assignment, by an insolvent debtor, which provides that the preferred creditors are not to enjoy its benefits unless they accept of its provisions in full satisfaction of their debts, and that if any of them refuse to accept they shall be excluded, and the *pro rata* share to which they would have been entitled, had they accepted, shall be paid to another specified creditor, and which makes no provision as to the disposition of any surplus that may remain in the event all the preferred creditors shall refuse to accept, after paying the debt of the residuary creditor, is fraudulent and void on its face."

Compare also *Grimshaw v. Walker*, 12 Ala. 101, and *Reavis v. Garner*, 12 Ala. 664, which are not mentioned in the opinion.

The case of *McCall v. Hinkley*, 4 Gill, 128, and *Kettlewell v. Stewart*, 8 Gill, 502, were virtually, though not expressly, overruled in *Green v. Trieber*, 3 Md. 11, and *Langston v. Gaither*, 3 Md. 40. In the later case of *Malcolm v. Hodges*, 8 Md. 418, the syllabus is as follows: "An implied reservation of the surplus, after paying the releasing or preferred creditors, to the grantor, avoids the deed equally with an express reservation, and the court cannot look outside of the deed to ascertain whether there will be a surplus or not." See also *Bridges v. Hindes*, 16 Md. 101; *Wheeler v. Stewart*, 40 Md. 414.

The case of *Hall v. Denison*, 17 Vt. 310, countenances stipulations for a release, as a condition of preference, but not as a condition of participation in the debtor's assets. The assignment did not attempt to exclude from all benefit under it such creditors as would not release their debts, but on the contrary, provided for the division of all property, remaining after paying preferred creditors, *pro rata* among all the creditors.

In *Dana v. Lull*, 17 Vt. 390, the head-note is as follows: "When a debtor makes a voluntary assignment of all his property to a trustee for the benefit of certain of his creditors, who are specified, and does not provide that the surplus shall be distributed among all his creditors, but there is either an express reservation

of the surplus to himself, or no direction given as to the surplus, the effect of which would be, by implication of law, a resulting trust, as to the surplus, to himself, such assignment is fraudulent *per se* and void. And this is so, notwithstanding it appears in the end that the property assigned was not sufficient to pay all the debts due to the creditors named in the assignment." * * *

The great names of Marshall and Story are appealed to, in *Clayton v. Johnson*, as favoring the view adopted by the court. But an examination of their opinions, in *Brashear v. West*, 7 Pet. 608, and in *Halsey v. Whitney*, 4 Mason, 206, shows that they reluctantly, and against the convictions of their better judgment, followed the local law of Pennsylvania and of Massachusetts.

The case of *Clayton v. Johnson*, *supra*, is on this point overruled.

We are further of the opinion that the deed under consideration is void, because it specifies no time within which creditors are to accept the provision made for them and surrender their debts. The assignee can never know when he is to begin to make distribution. He cannot tell what any creditor's share will be, until he knows what creditors are coming in. And as the time for signifying their election is unlimited, distribution may be indefinitely delayed. 2 Kent Com. *534; Burrill Assignments (4th ed.), 275; Bump. Fraud. Conv. (3 ed.) 440; *Pearpoint v. Graham*, 4 Wash. 232; *Henderson v. Bliss*, 8 Ind. 100; *Mayer v. Shields*, 59 Miss. 107.

Another fatal defect is that the deed provides the trust shall be administered and closed up under the supervision of the creditors who assent to it. The effect of this clause is to give a bare majority of assenting creditors complete control and power to keep the estate open as long as they choose. Creditors who are injured by the delay would have no redress, because the assignee is executing his trust according to its terms. The statute prescribes the duties of the assignee; and an assignment is fraudulent which vests in him any discretionary powers, or which directs or authorizes him to dispose of the property assigned, or to settle up the estate in a manner different from that pointed out in the statute. *Jaffray v. McGeehee*, 107 U. S. 361; *Raleigh v. Griffith*, 37 Ark. 150; *Leah v. Roth*, 39 Ark. 66; *Schoolfield v. Johnson*, 11 Fed. Rep. 297.

Judgment affirmed.

MARTIN V. HODGE.

(47 Ark. 373.)

Contract — illegal — lottery.

The owner of property, who disposes of it by lottery, may recover it from the drawer.

REPLEVIN. The opinion states the case. The defendant had judgment below.

J. M. Hill, for appellant.

O. W. Walkins, for appellee.

BATTLE, J. This is an action of replevin to recover the possession of two horses. There is no controversy about the facts in the case. As proven on the trial, they are, substantially as follows:

On the 25th day of December, 1884, the appellant, George W. Martin was the owner of two horses. He determined to dispose of them by lottery, and for that purpose sold two hundred and fifty tickets at \$1 each, James Hodge, the appellee, being one of the purchasers. Afterward, on the night of the 25th of December, 1884, the lottery took place in Eureka Springs of this State. Three men were selected to manage and conduct the drawing. Two hundred and forty-nine white, and one black marbles were placed in a revolving keg. A boy was blind-folded; the judges turned the keg, and the boy drew a marble from the keg. Each marble was numbered in the order drawn. The owner or holder of the ticket bearing the number of the black marble was to be the owner of the horses. As each marble was drawn the judges would turn the keg, and then the boy would draw another marble. The judges continued to turn the keg and the boy to draw one marble at a time until the seventieth drawing when the black marble was drawn, and some one exclaimed, "lucky Jim Hodge." Hodge, then, quickly went out of the house where the drawing took place, and without exhibiting his tickets, took possession of the horses, which Martin had hitched near by, and he and one Bollinger rapidly rode them away and put them in Hodge's stable, no one expressly objecting to their doing so. It was soon discovered that Hodge was not the

Martin v. Hodge.

owner or holder of ticket No. 70, but that one Turk Moore was. Hodge admitted he was not, and does not now claim that he ever was, or is. Soon after that discovery, and on the night of the drawing, Martin demanded of Hodge the possession of the horses and he refused to give them up. On the same night Martin commenced an action of replevin against Hodge, before a justice of the peace, for the possession of the horses, and about midnight the constable, who executed the order of delivery, took possession of them. "But the next day he went to the office of Hodge's attorney, in whose office was also the office of the justice of the peace before whom the cause was pending; and said he did not want to have any thing more to do with the affair, and dismissed the suit and told the constable, then present, that he would let Hodge and Moore fight it out, and to return the horses to Hodge," which the constable did. Afterward, on the same day, upon reconsideration, he changed his mind, and brought this action for the same horses.

Among the instructions given, the court instructed the jury as follows: "If plaintiff had parted with possession of the property in controversy to defendant, at or before the beginning of this suit, and intended so to part with it, either by delivering to Hodge or authorizing the delivery thereof, you will find for defendant. As to whether plaintiff parted with his property or the possession thereof, you are to determine from all the testimony."

"If you find from the evidence that the plaintiff has lost all right of title and possession to the horses in controversy, and is only attempting to recover the possession of the same for the purpose of furthering a violation of the law, such as a lottery is, then he cannot recover and your verdict must be for defendant."

And refused to instruct the jury, at the request of plaintiff, as follows:

"That the dismissal of the former suit did not prejudice plaintiff's right to a subsequent suit for the same subject matter; and that the dismissal of the former suit did not confer any right upon defendant."

"That a lottery consists in the distribution of prizes by chance; and neither the title nor right of possession to property can be acquired thereby."

A verdict was returned and a judgment was rendered in favor of defendant. Plaintiff moved for a new trial, which was denied, and he filed a bill of exceptions and appealed.

Martin v. Dodge.

It is a well settled doctrine that "every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." *Bartlett v. Vinor*, Carthew, 252; *Tucker v. West*, 29 Ark. 386.

It is equally well settled that "no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act. If from the plaintiff's own showing, or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of the positive laws of the country, then the courts say he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend aid to such a plaintiff." *Hollman v. Johnson*, 1 Cow. 341; *Nellis v. Clark*, 4 Hill, 424; *Merienthal v. Shafer*, 6 Iowa, 226; *Smith v. Bean*, 15 N. H. 577.

The test to determine whether a plaintiff is entitled to recover in action like this or not, is his ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery. *Eberman v. Reitzel*, 11 Watts & S. 181; *Phalen v. Clark*, 19 Conn. 421; s. c., 50 Am. Dec. 253; *Armstrong v. Toler*, 11 Wheat. 258.

The case of *Catts v. Phalen*, 2 How. 376, is illustrative of this rule. In that case, the defendant, Catts, was employed by the plaintiffs, Phalen and Morris, to draw out of a lottery wheel the tickets of numbers therein to be deposited by plaintiffs, without selection and by chance, it being understood that the tickets of numbers, when drawn out in a certain order, were to determine the prizes to such lottery tickets as the plaintiffs had disposed of, or still held in their own hands according as the tickets of numbers so drawn out corresponded with the numbers on the face of such lottery tickets respectively. Catts, after his employment, employed one Hill to purchase a ticket in this lottery for him, but apparently for Hill himself. Hill purchased the ticket in the manner he was employed, and delivered it to Catts. Catts, being in possession of the ticket purchased for him, on the day of the drawings, pretended to draw out of the wheel the

right to the horses. His right to recover is not dependent on that transaction.

Martin's right to recover does not depend on any disposition he may make of the horses in controversy. He can give them away. If the consideration of the gift is not deemed good in law, the gift will be only void as against creditors and purchasers. Hodge, so far as any thing appears in evidence, would not have a right to complain in any kind of an action. He certainly has not in this. Mansf. Dig., § 3376.

The dismissal of the first action of replevin should not prejudice plaintiff's right to the horses. He was compelled to restore them to the possession of Hodge. He could not dismiss on any other condition. The dismissal placed the parties in *statu quo*. The statute expressly provides that such dismissals may be without prejudice to a future action. The evidence shows he did not concede Hodge's right to hold the horses as a price or otherwise by the dismissal. Mansf. Dig., §§ 5102, 5103.

In giving the instructions above set forth, in so far as they are inconsistent with this opinion, and in not giving those asked for and refused as before stated the court erred. The motion for new trial should have been granted.

The judgment of the court below is reversed, and this cause is remanded with an instruction to the court to grant appellant a new trial.

Judgment reversed.

SCALES V. STATE.

(47 Ark. 475.)

Criminal law — Sabbath-breaking — constitutionality.

An indictment lies against one for laboring on Sunday, although he belongs to a sect who observe another day as the Sabbath, and conforms to their practice. (See note, p. 772.)

CONVICTION of Sabbath-breaking. The opinion states the case.

J. D. Walker, for appellant.

Daniel W. Jones, attorney-general, for appellee.

Scales v. State.

COCKRILL, C. J. This is an appeal from a conviction for "Sabbath-breaking." The sufficiency of the indictment was questioned by a motion in arrest of judgment. The particular act that constitutes the alleged offense is not set out. The indictment charges merely that the defendant "on the 3d day of May, 1885, the said day being Sunday, unlawfully was found laboring and performing other services, the same not then and there being of customary household duty of daily necessity, comfort or charity.

[Omitting question of form.]

The statute under which this conviction was had comes to us from the Revised Statutes of 1838. It contained this provision, which was carried forward into the revision of 1884 as section 1886, viz.: "Persons who are members of any religious society who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday, shall not be subject to the penalty of this act, so that they observe one day in the seven agreeably to the faith and practice of their church or society." But in 1885, before the commission of the offense charged in the indictment, the legislature passed an act the only part of which that is material to this prosecution is as follows: "That section 1886 of Revised Statutes of Arkansas be and the same is hereby repealed." Acts of 1885, p. 37.

The proof showed that the appellant was found painting a church on a Sunday. He offered to prove that he was a member of a religious society known as the Seventh Day Baptists, one of the tenets of which is the observance of Saturday as the Sabbath instead of Sunday, and that he had regularly refrained from all secular work and labor on Saturday agreeably to his religious faith and that of his church.

It is argued that the court erred in rejecting this testimony because it is said, first, the effort to repeal section 1886 was ineffectual; and second, that if it was not, the law without the exception made by that section, gives a preference to the other religious denominations over that of the appellant, within the meaning of section 24 of article 2 of the State Constitution, which provides that "No preference shall ever be given by law to any religious establishment, denomination or mode of worship above any other," and moreover denies to him the equal protection of the law, within the meaning of the Federal Constitution.

[Omitting first ground.]

The constitutionality of this law as originally enacted has been

repeatedly affirmed by this court in both civil and criminal cases. *Shover v. State*, 10 Ark. 259; *State v. Anderson*, 30 Ark. 131; *Tucker v. West*, 29 Ark. 386; *Merritt v. Robinson*, 35 Ark. 483.

No reference was ever made to the exception contained in section 1886, for the purpose of maintaining its validity, and we are cited to no case or authority where the view is entertained that the failure to make the exception in favor of those who faithfully observe a different day as their Sabbath will render the law invalid. The Supreme Court of California expressed that view in 1858, over the dissent of Judge STEPHEN J. FIELD (*Ex parte Newman*, 9 Cal. 502), but the dissenting opinion was afterward adopted by the court as the correct exposition of the law (*Ex parte Andrews*, 18 Cal. 678), and the validity of the statute has ever since been maintained in that State. *Ex parte Bird*, 19 Cal. 130; *Ex parte Koser*, 60 Cal. 177.

The validity of similar statutes has been affirmed elsewhere against repeated assaults, and in Louisiana it has even been held that a municipal ordinance which forbade the sale of goods on Sunday, but excepted from its operation those who kept their places of business closed on Saturday, was in the teeth of the Constitution, in that it gave to the Saturday observer a privilege denied to others. *City of Shreveport v. Levy*, 26 La. Ann. 671. But the legislative enactments of most of the States preserve to those whose religious faith impels them to keep holy a different day from Sunday, the right to keep Sunday as a secular day, if not to the full extent given under our statute before the act of 1885, at least to do so in such a manner as not to disturb those who observe that day, and the acts in either form, whether making a full and free exception of the observer of other days, or none at all, are held to be a valid exercise of legislative power.

The reasons that are commonly given for sustaining these acts are briefly stated by Judge DEVENS, in a recent Massachusetts case, in these words: "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for that purpose, and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the

community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems suitable or appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of the community." *Commonwealth v. Has*, 122 Mass. 40. See too *Cooley Const. Lim.* * 476-7; *Desty Cr. Law*, § 117 *a*, and cases cited; *Frolickstein v. Mayor of Mobile*, 40 Ala. 725; *Gabel v. City of Houston*, 29 Tex. 335; *Swann v. Swann*, 21 Fed. Rep. 299; *Parker v. State* (Sup. Ct. Tenn. 1886), 1 S. W. Rep. 202; *Specht v. Commonwealth*, 8 Penn. St. 312; s. c., 49 Am. Dec. 518, and cases cited *supra*.

It is said that every day in the week is observed by some one of the religious sects of the world as a day of rest, and if the power is denied to fix by law Sunday as such a day, the same reason would prevent the selection of any day; but the power of the legislature to select a day as a holiday is everywhere conceded. This State, from the beginning, has appropriated Sunday as such. On that day the business of our courts and public offices has always been suspended (Mansf. Dig., § 1483); the issuance and service of legal process prohibited; presentment and notice of dishonor of commercial paper not allowed (Mansf. Dig., § 465), and the performance of an act in execution of a contract which matures upon Sunday, postponed to the next day. *L. R. & Ft. S. Ry. v. Dean*, 43 Ark. 529. This observance of Sunday as a day of refrainment from secular business has always been required of the people generally, without reference to creed, and they continue to so observe it without complaint, that as a municipal corporation it violates any of their constitutional or religious rights. The principle which upholds these regulations underlies the right of the State to prescribe a penalty for the violation of the Sunday law. The law which imposes the penalty operates upon all alike, and interferes with no man's religious belief, for in limiting the prohibition to secular pursuits it leaves religious profession and worship free. *Ex parte Newman*, *supra*.

The appellant's argument then is reduced to this, that because

repeatedly affirmed by this court in both civil and criminal cases. *Shover v. State*, 10 Ark. 259; *State v. Anderson*, 30 Ark. 131; *Tucker v. West*, 29 Ark. 386; *Merritt v. Robinson*, 35 Ark. 483.

No reference was ever made to the exception contained in section 1886, for the purpose of maintaining its validity, and we are cited to no case or authority where the view is entertained that the failure to make the exception in favor of those who faithfully observe a different day as their Sabbath will render the law invalid. The Supreme Court of California expressed that view in 1858, over the dissent of Judge STEPHEN J. FIELD (*Ex parte Newman*, 9 Cal. 502), but the dissenting opinion was afterward adopted by the court as the correct exposition of the law (*Ex parte Andrews*, 18 Cal. 678), and the validity of the statute has ever since been maintained in that State. *Ex parte Bird*, 19 Cal. 130; *Ex parte Koser*, 60 Cal. 177.

The validity of similar statutes has been affirmed elsewhere against repeated assaults, and in Louisiana it has even been held that a municipal ordinance which forbade the sale of goods on Sunday, but excepted from its operation those who kept their places of business closed on Saturday, was in the teeth of the Constitution, in that it gave to the Saturday observer a privilege denied to others. *City of Shreveport v. Levy*, 26 La. Ann. 671. But the legislative enactments of most of the States preserve to those whose religious faith impels them to keep holy a different day from Sunday, the right to keep Sunday as a secular day, if not to the full extent given under our statute before the act of 1885, at least to do so in such a manner as not to disturb those who observe that day, and the acts in either form, whether making a full and free exception of the observer of other days, or none at all, are held to be a valid exercise of legislative power.

The reasons that are commonly given for sustaining these acts are briefly stated by Judge DEVENS, in a recent Massachusetts case, in these words: "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for that purpose, and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the

community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems suitable or appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of the community." *Commonwealth v. Has*, 123 Mass. 40. See too *Cooley* Const. Lim. * 476-7; *Desty* Cr. Law, § 117 *a*, and cases cited; *Frolickstein v. Mayor of Mobile*, 40 Ala. 725; *Gabel v. City of Houston*, 29 Tex. 335; *Swann v. Swann*, 21 Fed. Rep. 299; *Parker v. State* (Sup. Ct. Tenn. 1886), 1 S. W. Rep. 202; *Specht v. Commonwealth*, 8 Penn. St. 312; s. c., 49 Am. Dec. 518, and cases cited *supra*.

It is said that every day in the week is observed by some one of the religious sects of the world as a day of rest, and if the power is denied to fix by law Sunday as such a day, the same reason would prevent the selection of any day; but the power of the legislature to select a day as a holiday is everywhere conceded. This State, from the beginning, has appropriated Sunday as such. On that day the business of our courts and public offices has always been suspended (Mansf. Dig., § 1483); the issuance and service of legal process prohibited; presentment and notice of dishonor of commercial paper not allowed (Mansf. Dig., § 465), and the performance of an act in execution of a contract which matures upon Sunday, postponed to the next day. *L. R. & Ft. S. Ry. v. Dean*, 43 Ark. 520. This observance of Sunday as a day of refrainment from secular business has always been required of the people generally, without reference to creed, and they continue to so observe it without complaint, that as a municipal corporation it violates any of their constitutional or religious rights. The principle which upholds these regulations underlies the right of the State to prescribe a penalty for the violation of the Sunday law. The law which imposes the penalty operates upon all alike, and interferes with no man's religious belief, for in limiting the prohibition to secular pursuits it leaves religious profession and worship free. *Ex parte Newman*, *supra*.

The appellant's argument then is reduced to this, that because

Scales v. State.

he conscientiously believes that he is permitted by the law of God to labor on Sunday, he may violate with impunity a statute declaring it illegal to do so. But a man's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land. *Reynolds v. U. S.*, 98 U. S. 145.

If the law operates harshly, as laws sometimes do, the remedy is in the hands of the legislature. It is not the province of the judiciary to pass upon the wisdom and policy of legislation—that is for the members of the legislative department, and the only appeal from their determination is to their constituency.

Judgment affirmed.

NOTE BY THE REPORTER.—The following is an abstract of *State v. Judge, etc.*, Louisiana Supreme Court, February 7, 1887: A statute whose object is to require the closing of all places of business, with exceptions of certain designated classes, from 12 o'clock on Saturday night until 12 o'clock on Sunday night of each week, and to punish violations thereof by criminal penalties, is valid. (1) We take occasion promptly to say that if the object of this law were to compel the observance of Sunday as a religious institution, because it is a Christian Sabbath, to be kept holy under the ordinances of the Christian religion, we should not hesitate to declare it to be violative of the above constitutional prohibition. It would violate equally the religious liberty of the Christian, the Jew, and the infidel, none of whom can be compelled by law to comply with any merely religious observance, whether it accords with his faith and conscience or not. With rare exceptions, the American authorities concur in this view. The law in question makes no reference to Sunday as a legal holiday, and indeed the exceptions expressly made to the general prohibition conclusively show that the statute is not designed to enforce the Christian idea of the Sabbath, or to apply the rules of any religious sect to its observance. "The statute is to be judged precisely as if it had selected for the day of rest any day of the week other than Sunday, and its validity is not to be questioned, because in the exercise of a wise discretion it has chosen that day which a majority of the inhabitants of this State, under the sanction of their religious faith, already voluntarily observe as a day of rest. For these reasons we consider that the constitutional provision now under consideration has no application. (2) It is claimed that the law conflicts with that clause of the fourteenth amendment to the Constitution of the United States which forbids any State "to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." No one who has read the decision of the Supreme Court of the United States in the celebrated *Slaughter House Cases* can for a moment doubt that the clause is entirely without application. Fortunately for the preservation of State autonomy and the inestimable right of local self-government, that high tribunal has wisely distinguished the "privileges and immunities" of citizens of the United States from those which appertain to citizens of the State. To the latter class belong, as it holds, all those fundamen-

Scales v. State.

tal civil rights for the security and establishment of which organized society is instituted, and these remain, with certain exceptions expressly established by the Federal Constitution, subject to the exclusive control and authority of the States free from all Federal restraint. On the other hand, the "privileges and immunities of citizens of the United States" are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, and the laws and treaties made in pursuance thereof; and these alone are placed under Federal protection by the clause quoted. It declares that a different construction "would transfer the security and protection of all the civil rights from the State to the Federal government," would "authorize Congress" to pass laws in advance, limiting and restricting the legislative power by the States in their most ordinary and usual functions, and would constitute the Supreme Court of the United States "a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights." Wherefore the court said: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." *Slaughter House Cases*, 16 Wall. 36. It is needless to say that the privileges and immunities involved under this statute belong to that class which the court characterizes as those of citizens of the State, and therefore are not referred to by this clause of the fourteenth amendment. (8) The other constitutional inhibitions invoked may be grouped and considered together. They are: First, the remaining clauses of the fourteenth amendment, viz.: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws;" second, the clause of article 6 of the State Constitution declaring that no person shall be "deprived of life, liberty or property without due process of law;" and thirdly, the declaration in article 1 of the State Constitution that government's "only legitimate end is to protect citizens in the enjoyment of life, liberty and property. When it assumes other functions it is usurpation and oppression." All these provisions simply express fundamental principles of American constitutional government, which are embodied or necessarily implied in the Constitution of all the States, and are everywhere recognized and enforced. It is not essential to discuss them severally, or with too great nicety; for it is universally admitted, that however broadly these principles may be expressed, there exists, *ex necessitate rei*, in every government, the power to impose certain restrictions upon the individual rights of "life, liberty and property," which it is not within the meaning and intent of such provisions to prohibit or restrain. Without such power society and government could not exist, or would subserve no useful purpose; the main object of government being to prevent individuals, in the exercise of their own rights, from transgressing the rights of others, and to impose that degree of restraint upon the conduct of each which is necessary to the conservation and promotion of the right of all. This is what is known as the police power of government, and it is founded in and properly limited by a just and reasonable application of the principle, *sic utere tuo ut alienum non laedas*. As has been said by an eminent judge, "It is much easier to perceive

Scales v. State.

and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." Definitions of it have been given by Blackstone, by Judge Cooley, by Chief Justice SHAW, of Massachusetts, by Chief Justice REDFIELD, of Vermont, and by Judge CHRISTIANCY, of Michigan, and by many other jurists and judges. *Vide* 4 Bl. Com. 162; Cooley Const. Lim. 572; *Com. v. Alger*, 7 Cush. 84; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140; s. c., 62 Am. Dec. 625; *People v. Jackson, etc., Co.*, 9 Mich. 285. There exists a remarkable *consensus* of authority that the establishment of a compulsory day of rest in each week is a legitimate exercise of police power. Such laws have been passed in nearly every State of the Union, and their constitutionality has never been successfully questioned in but a single case within our knowledge, that of *Ex parte Newman*, 9 Cal. 502, and it was subsequently overruled in the same court in *Ex parte Andrews*, 18 Cal. 678. The grounds upon which such legislation has been sustained are various, but those which commend themselves to our judgment as most conformable to the principle of police power are best stated by the Supreme Court of California. "The duty of government comprehends the moral as well as the physical welfare of the State; and in this instance it is asserted on behalf of this law that the passage of it is essential to the welfare of the people, both moral and physical. It is claimed that from physical causes men require respite from intellectual and physical labor in the proportion of one day's rest in seven, and that a law which enjoins this is not only for the aggregate good of society, but for the benefit of all the members. It is said that the labor of six days, with this relaxation, is more productive in the long run than the uninterrupted labor of the week. It is said besides that this law affords indirectly protection against oppression to employees, women, apprentices and servants, and that but for the law men would keep open stores and shops because their neighbors did so, and that by competition a sort of compulsion exists to violate the laws of health." *Ex parte Andrews*, 18 Cal. 678. Mr. Tiedeman develops the same idea as follow: "Whatever the metaphysicians or theologians may tell us about free will, in the complex society of the present age the individual is a free agent to but a limited degree. He is in the main but a creature of circumstances. Those who most need the cessation from labor are unable to take the necessary rest if the demands of trade should require their uninterrupted attention to business; and if the law did not interfere, the feverish, intense desire to acquire wealth, inciting a relentless rivalry and competition, would ultimately prevent, not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation, by resting periodically from labor. Remove the prohibition of law, and this wholesome sanitary regulation would cease to be observed." Tied. Lim. Police Power, 181. We have considered the objections urged against the law, that it operates unjustly against our fellow-citizens of the Jewish faith, who, in obedience to the mandates of their religion, observe Saturday as a day of rest. This objection has been often considered and overruled. *Frolickstein v. Mayor of Mobile*, 40 Ala. 725; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 id. 130; *Com. v. Hyneman*, 101 Mass. 30; *Com. v. Has*, 122 id. 40; *Com. v. Wolf*, 3 Serg. & R. 48; *Specht v. Com.*

Kempner v. Cohn.

8 Penn. St. 812; s. c., 49 Am. Dec. 518; *Charleston v. Benjamin*, 2 Strobb. 508; *State v. Railroad Co.*, 15 W. Va. 362; s. c., 36 Am. Rep. 808. The law leaves the Jew at entire liberty to observe his own religious Sabbath, but it is not bound to take cognizance of individual religions as a ground of redemption from the operation of the general laws. Uniformity in the day fixed is essential to the successful execution of the law, which would be rendered much more difficult if a different day of rest was assigned to various classes, besides the inconvenience to the business interests of the community which would result from the partial suspension of trade on several different days. It only remains to consider the objection urged against the law on the ground of inequality, because of the numerous exceptions contained in the act. The objection has not the slightest force. The law is not unequal in any constitutional sense. No person in the State is permitted to pursue any of the prohibited callings on Sunday. Every person is at liberty to pursue those which are excepted. The same discretion which authorizes the legislature to determine that the public health, welfare, and convenience required the adoption of the general rule equally authorized it to exempt from its operation certain specified callings, on the ground that the public welfare and convenience would be more hindered than advanced by the suspensions of such callings. It is not for us to control the law-making power in such a case, or to require it to fit its laws to a Procrustean bed of our own construction. See note, 41 Am. Rep. 579.

KEMPNER v. COHN.

(47 Ark. 519.)

Contract — by letter.

A contract by letter is complete the moment an acceptance of the offer is mailed, providing it is done with reasonable promptness and before any intimation of withdrawal is received.*

CONTRACT. The opinion states the case. The plaintiff had judgment below.

J. H. Harrod, for appellant.

Caruth and Erb, for appellee.

SMITH, J. Cohn sued Kempner for the non-payment of an alleged agreement to convey a certain lot on Main street in the city of Little Rock. He claimed damages for the loss of his bargain, for expenses incurred in investigating the title, for the loss

* See notes, 32 Am. Rep. 40; 48 Am. Rep. 519.

Kempner v. Cohn.

of interest upon the money which he had raised by the sale of interest-bearing securities in order to comply with the terms of purchase and which he had been unable immediately to reinvest to his satisfaction, and for the loss of a profitable lease of the lot which he had made on the faith of getting the lot.

The answer denied the existence of any contract between the parties for the sale of the lot. Upon a trial before a jury, the plaintiff recovered a verdict and judgment for \$611.50. The assignments in the motion for a new trial were the admission of improper evidence, the refusal of the court to give a certain charge to the jury and want of evidence to sustain the verdict.

The plaintiff lived in Little Rock, the defendant at Hot Springs. The two cities are about sixty miles apart and there is communication by mail twice a day. On the 28th of January the plaintiff wrote the defendant inquiring his terms. The answer was as follows:

“HOT SPRINGS, *January 30, 1885.*

“M. M. Cohn, Little Rock, Ark.:

“Dear Sir—Yours of the 28th received and contents noted. In reply will say, in regard to the lot, I will sell you for \$10,000, \$5,000 cash and \$5,000 give your note with ten per cent interest. If that is satisfactory, send the deed and I will send you properly acknowledged.

Respectfully yours.

J. KEMPNER.”

This letter was sent in the care of A. Kempner, the defendant's uncle, and agent for the payment of taxes and collection of rents, but who had no authority to contract for the sale of the lot; so that it was not delivered to Cohn until February 2. On February 5 Cohn told A. Kempner he would take the property and requested him to inform the defendant. And in reply to the letter of January 30, he wrote himself, as follows:

“LITTLE ROCK, ARK., *February 7, 1885.*

“J. Kempner, Hot Springs, Ark.:

“Dear Sir—I hand you herewith the deed for your property, which you and your wife will please sign and have duly acknowledged. In order that I may get possession as soon as possible, I would like for you to return the deed, as well as all the deeds, memoranda, agreements, contracts, etc., that you have in connection with this property, at your earliest convenience, say by Mon:

Kempner v. Cohn.

day's mail, if you can. I am having the title looked up now, which if found correct, I will comply with your terms contained in your letter of January 30, to-wit: \$5,000 in cash and my note for balance or other \$5,000. If you should prefer, I will give you Mr. A. Kempner's indorsement, the note to bear ten per cent per annum. You can send the deed to Mr. A. Kempner if you want to, or to the Merchant's National Bank, if you prefer. Though if convenient, I would rather you would come up, because it is always easier to talk than to write. By the memoranda, agreements, etc., I mean your papers relating to the walls on each side, so as to know what to claim. Hoping you will give this your early attention, I am, yours truly,

M. M. COHN."

This letter was put into one of the government letter boxes before Cohn had received any notice that the offer was withdrawn. The envelope is postmarked Little Rock, February 7, 9 P. M. It reached Kempner on the 9th of February. The defendant being informed by letter from A. Kempner that Cohn was making his arrangements to buy the property, wrote on the 7th of February, to Cohn, that he had changed his mind and now declined to sell.

Evidence was given, over objection, that Cohn, immediately after receiving the letter of January 30, had set to work to procure an abstract of the title, paying therefor \$11.50, and had employed attorneys to examine the same at a cost of \$50. Also that he had parted with valuable securities to raise the money for the cash payment, and that after Kempner's refusal to consummate the trade, he had tried unsuccessfully, for some two months, to reinvest the money, whereby he had lost \$80 or \$100 in interest. It was further proved, without objection, that Cohn, about the time he wrote accepting the offer, had made a contract with another person, for a lease of the lot. The property was variously estimated by different witnesses to be worth from \$10,000 to \$12,500.

The plaintiff requested no special directions to the jury.

The instructions given at the defendant's instance were as follows:

1. The court instructs the jury that before they will be authorized to find damages for plaintiff in any sum whatever, they must believe from a preponderance of the evidence that the contract between plaintiff and defendant for the sale of said lot was definite and complete and without condition.

2. That before the jury can say that the contract in this case was completed, they must find from the evidence that the offer made by Kempner was accepted by Cohn absolutely and without qualification, and unless the offer of Kempner was thus accepted you will find for the defendant.

3. If the jury finds from the evidence that the letter of Cohn to Kempner in regard to accepting the offer of said lot contained any qualification of Kempner's proposition whatever, or that said letter was not an absolute acceptance of said proposition, Kempner is not bound and you will find for defendant.

4. Nor would Kempner be bound by the unconditional and unqualified acceptance of his offer unless the acceptance was made within a reasonable time, and it is for the jury to say what is a reasonable time, taking into consideration the situation of the parties and their facilities for communication, and unless you find from the evidence that Kempner's offer was accepted unconditionally and within a reasonable time by Cohn, you will find for defendant, Kempner.

5. The court instructs the jury that Cohn cannot recover damages for being kept out of the interest of his money, unless he tried to secure investment and failed, even if there was an absolute contract for the sale of the land.

6. The court instructs the jury that the statements made by Cohn to A. Kempner, that he, Cohn, would take the property, cannot be considered as an acceptance of J. Kempner's proposition.

And the court denied the sixth prayer, which was: "If the jury find from the evidence that Kempner rescinded his offer to sell the lot for \$10,000, and mailed that revocation before Cohn mailed his acceptance of the offer, they will find for the defendant."

I. The most material inquiry is, whether the minds of the parties ever met, or mutually assented to the same thing. When parties are conducting a negotiation through the mail, a contract is completed the moment a letter accepting the offer is posted, provided it be done with due diligence, after receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. 2 Kent Com. 477; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlap v. Higgins*, 1 H. L. Cas. 381; *Abbott v. Shepard*, 48 N. H. 14; *Mactier v. Frith*, 6 Wend. 103; s. c., 21 Am. Dec. 262; *Stockham v. Stockham*, 32 Md. 196.

II. Whether an offer remains open is a question of fact. Of

Kempner v. Cohn.

course the proposer may limit the time for acceptance, as every man has the right to dictate the terms upon which he will sell his property. Where an answer by return mail is requested, or may be expected from the usage of trade, or nature of the business, the making of the offer is accompanied by an implied stipulation that the answer shall be immediate. But unless the time is limited, the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time. Whart. Cont., § 9; *Mactier v. Frith*, *supra*; *Dunlop v. Higgins*, *supra*; *Hollock v. Insurance Co.*, 2 Dutch. 268; *Maclay v. Harvey*, 90 Ill. 525; s. c., 32 Am. Rep. 35.

Averill v. Hedge, 12 Conn. 423, is distinguishable from the case at bar in at least two particulars. There A., on the 16th of March, wrote offering to sell iron at a certain price, and the letter reached B., at Hartford, on the evening of the 18th; on the 19th, B. wrote a letter, accepting the offer, but it was not mailed until the 20th, and there being no mail on that day the letter did not get off until the 21st. And it was held the acceptance came too late. But the parties were dealing in a commodity that then was undergoing great fluctuations in value from day to day, and A. said in his letter: "We shall not consider ourselves holden to the offer made you unless you signify your acceptance thereof by return mail."

The defendant, having caused the question of reasonable time to be submitted to the jury, under an instruction drawn by his counsel, and having met with an adverse decision, now asks us to declare, as matter of law, that Cohn's acceptance was unreasonably delayed. But we think the question was properly resolved in favor of the plaintiff. The subject of negotiation was real estate, which requires more deliberation than if it had been a transaction in cotton or other article of merchandise. It is also less subject to sudden and violent fluctuations in price. Five days was not an unreasonable time within which to come to a determination, have the title looked into, and a conveyance prepared.

Then as to the attempted retraction: An offer made by letter, which is to be answered in the same way, cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before he has accepted. An uncommunicated revocation is in law no revocation at all. Benj. Sales, § 44; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Stevenson v. McLean*, 5 Q. B. Div. 346; s. c., 29 Moak's Eng. 341; s. c., 20 Am. Law Reg. 16; *Byrne v. Van Tierhoven*, 5 C. P. Div. 344; s. c., 30 Moak's Eng. 833.

Kempner v. Cohn.

When Kempner penned his withdrawal of the offer he did not know that it had been accepted at that time. But it was not necessary that he should know of it; and the acceptance was effectual to complete the contract, notwithstanding Kempner had previously mailed a letter to Cohn announcing the retraction of the offer. The case of *McCulloch v. Eagle Ins. Co.*, 1 Pick. 283, which holds a different doctrine, has been generally rejected as authority.

[Omitting question of damages.]

If the plaintiff shall, during the present term, enter a remittitur upon the usual terms of \$100, his judgment will be affirmed, otherwise he must submit to another trial.

CASES

IN THE

SUPREME COURT

OF

OHIO.

INSURANCE COMPANY V. PYLE.

(44 Ohio St. 19.)

Insurance — warranty — breach — recovery of premiums.

An innocent breach of warranty in an application for an insurance policy in a material matter, renders the policy void from the beginning, but the premiums paid may be recovered.

ACTION on an insurance policy. The opinion states the case. The plaintiff had judgment below.

Lawrence T. Neal, for plaintiff in error.

Clark and McDougal, for defendant in error.

FOLLETT, J. In filling up the application for this policy, Nipgen was the agent of the insurance company, and was not the agent of Pyle. *Insurance Co. v. Williams*, 39 Ohio St. 584. And though the application was thus made, the policy was cancelled for its untrue statements innocently made on the part of Pyle.

The application and the policy together form the contract. The terms of the contract are plain and free from doubt and ambiguity. It is agreed in the application “ that this application shall form a part of the contract of insurance, and that if there be, in any of

the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void."

And the policy provides that "this policy is issued and accepted upon the following express conditions and agreements: 1. That the answers, statements, representations and declarations, contained in, or indorsed upon this application for this insurance — which application is hereby referred to and made part of this contract — are warranted by the insured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation or concealment, that this policy shall be absolutely null and void."

I. Did the policy ever attach, or was it ever valid?

The court finds as conclusions of fact, that "several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered;" and the "court further finds that the untruth of several of said answers was upon questions material to the risk, and that by the terms of said policy, and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy, and that by its terms the breach of said warranties was to make said policy null and void."

And the court finds as a conclusion of law, that the policy "is wholly void, and of no effect whatever, and was so from the moment it was issued."

But the plaintiff in error insists that the policy took effect and was in force until it was cancelled. To sustain such a claim would ignore the express terms of both the application and the policy, as well as the cause of the cancellation of the policy. These terms the plaintiff in error has never waived, but it has insisted upon them and acted upon the strict letter of the agreement, and has cancelled the policy.

This is not a new question in the courts. In the case of *Clark v. Manufacturer's Ins. Co.*, 2 Woodb. & M. 472, the court held: "A warranty is generally a stipulation made and described in the policy itself, and must be complied with, whether material or not." "Where a material fact is suppressed in such representations, the insurance is avoided, and the policy does not attach, whether the suppression happens by neglect or fraud." In *Friesmuth v. Agawam Mutual Fire Ins. Co.*, 10 Cush. 587, "the application contained an

untrue representation that the property was unincumbered," and the court held, "that the policy was wholly void." In *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571, the court held: "If a policy of insurance declare that the statements made in the application shall be part and parcel of the policy, such statements become warranties, and must be true, whether material or not."

"A contract of insurance, like other contracts, is avoided by an untrue statement by either party as to a matter vital to the agreement, though there be no intentional fraud in the misrepresentation." *Co-operative Life Ass'n of Miss. v. Leflore*, 53 Miss. 1.

On a similar contract the Supreme Court of the United States, in *Jeffries v. Life Ins. Co.*, 22 Wall. 47, held: "Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk." And in the opinion, Mr. Justice HUNT says: "Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company." And this is approved in the case of *Aetna Life Ins. Co. v. France*, 91 U. S. 510, and there the court also held, "that the company was not liable if the statements made by the insured were not true. The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should void the policy, removes the question of their materiality from the consideration of the court or jury."

This court, in *Union Mutual Life Ins. Co. v. McMillen*, 24 Ohio St. 67, held: "Where a life policy is made and accepted, upon the expressed condition that if the annual premium is not fully paid within the time specified, the policy 'shall be null and void, and wholly forfeited,' the failure to pay the premium avoids the policy;" and that was where the policy had attached. But in such a case, in *Union Central Life Ins. Co. v. Bernard*, 33 Ohio St. 459, the court held, where "the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy-holder, through a local agent residing in his neighborhood, good faith requires that this mode of collection should not be discontinued, and payment required at the company's office, without notice to the insured."

Insurance Company v. Pyle.

There are mistakes in policies that may be disregarded or corrected and the policy enforced. See *Harris v. Columbiana County Mutual Ins. Co.*, 18 Ohio, 116; s. c., 51 Am. Dec. 448, and *Insurance Co. v. Williams*, *supra*. But in this case the court did not err in holding the policy "is wholly void and of no effect whatever, and was so from the moment it was issued."

II. Should the premium be returned ?

The court finds as a conclusion of law that Pyle is entitled to recover of the insurance company the premium paid, with proper interest. The court thus held, not only because the policy was void *ab initio*, but because it also found "that all of said questions so erroneously answered were answered by the plaintiff under an innocent misapprehension of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant."

There was no actual fraud, at least on the part of Pyle. On this policy, no risk ever attached.

In 1777, in the case of *Tyrie v. Fletcher*, Cowp. 666, 668, Lord MANSFIELD stated the general rule to be, "that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it."

In 1800, in the case of *Delavigne v. United Ins. Co.*, 1 Johns. Cas. 310, the court held, "where a policy becomes void by a failure of the warranty, the insured is entitled to a return of the premium, if there be no actual fraud."

"Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer." *Anderson v. Thornton*, 8 Exch. 425.

And such is now the general rule. See 3 Kent Com. *341, and May on Ins., § 4.

The rule is different where the risk has attached or there is actual fraud.

Arcade Hotel Co. v. Wiatt.

Yet it is urged here that "we must leave the premium paid by the insured to be disposed of according to the terms of his contract with the insurer." No such terms exist. There is no contract between Pyle as the "insured" and the company as the "insurer." Under the policy Pyle never was insured, and the company never was an insurer of Pyle. The policy has always been void, and this claim, based on the contract, is as void as the policy. From all that appears Pyle was not in fault, and the agent should not have obtained the premium, and the insurance company should not retain Pyle's money.

Of course, we have not considered how far the provisions of such a policy may be waived by the acts of the parties, nor to what extent such parties may be bound by their subsequent acts, and in connection with such provisions, and what was done in procuring such application and policy. The court did not err.

Judgment affirmed.

ARCADE HOTEL CO. V. WIATT.

(44 Ohio St. 33.)

Innkeeper — who is guest.

The keeper of a gambling house closed his night's business at two o'clock A. M.; visited an inn in the same city to deposit his money for safe-keeping; inquired of the clerk for lodgings, for the night, stating that he did not desire to go to his room at that time, but wished to leave some money with the clerk, and would return in about half an hour. The clerk promised to reserve a room for him. He did not register, and no room was assigned him. He left his money with the clerk, received a check for it, and departed. He returned in about three hours to have a room assigned him and go to bed. The clerk had absconded with the money. *Held*, that he was not a guest and the innkeeper was not liable.*

ACTION to recover money. The opinion states the case. The plaintiff had judgment below.

Perry & Jenney, for plaintiff in error.

Campbell, Bates & Bettman, for defendant in error.

OWEN, J. [Minor matter omitted.] 1. Was Wiatt a guest at

* See *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112, 119, note.
VOL. LVIII — 99

the hotel at the time he delivered to the clerk the package containing the money involved in suit? This is the vital issue in the case. That the money was deposited and lost is assumed. It is maintained by defendant in error that this was a question of fact, and that the judgment of the trial court upon the evidence is conclusive.

Conceding that there was substantial conflict in the evidence upon this issue, the position of counsel is well chosen. If however the facts are definitely ascertainable from the undisputed evidence, whether Wiatt was a guest of the hotel is a question of law. We do not undertake to weigh conflicting proof. If there was evidence fairly tending to prove Wiatt a guest of the hotel at the time he deposited his money with the clerk, the judgment below is, upon that issue, conclusive. If however the evidence offered upon this issue, construed most favorably to the plaintiff below, does not fairly tend to establish that relation, it is our duty to say, as a legal conclusion, that the judgment below is erroneous.

The arguments of counsel, aside from the alleged error in admitting the statements of Holloway, and whether Wiatt was a guest, are chiefly addressed to the question whether Wiatt, being a resident and householder of the city of Cincinnati at the time he left his money with the clerk of the hotel, and not in any sense a traveller, was capable of becoming a guest of the hotel, and of charging its proprietor with the safe-keeping of his money. Without entering upon the consideration of the question, we are content to assume, without deciding, that Wiatt was so capable of becoming a guest, and to proceed with the consideration of the proof which is relied upon to establish such relation.

It must be conceded, that unless the relation of innkeeper and guest subsisted between Wiatt and the proprietor of the hotel at the very time the money was received by the clerk, or at the time of the loss, no recovery could be had for such loss.

[Omitting details of testimony, sufficiently indicated in head-note.]

At the time the clerk took charge of his money, Wiatt had not registered his name; it was not entered upon any of the books of the hotel; no room had been assigned him; and while it is not necessary to contend that all or any of these facts were necessary to constitute him a guest of the hotel, they are valuable aids in determining, in the light of the other proof in the case, whether that

relation in fact existed. There is no proof which may account for his failure to register. Still if he had registered, and this is shown to have been for the purpose of securing a safe depository for his money, it would not avail him.

It will not do to contend that the deposit of his money contributed to constitute him a guest. Unless he was a guest, the clerk had no authority to bind his principal by receiving the money.

In *Carter v. Hobbs*, 12 Mich. 52, it is held: "In order to make one liable as innkeeper at the common law, for goods lost at his inn, it must appear that he was acting in the capacity of innkeeper on the occasion when the goods were received, and that the owner was his guest; in other words, that the latter visited the inn for purposes which the common law recognizes as the purposes for which inns are kept."

In *Gelley v. Clerk*, Cro. Jac. 188, defendant was an innkeeper at Ubridge. Plaintiff was his guest. Plaintiff left his goods at the inn, and went to London, saying he would return in two or three days. He returned within three days and found his goods had been stolen. Action on the case was brought for the value of the goods, and it was held: "If one come to an inn and leave his goods and horse, and go into the town, and afterward return, and in the meantime his goods are stolen, no doubt but he is a guest, and shall have a remedy. And so was *Sir Edwin Sands'* case, for his absence in part of the day is not material, but he is always reputed as a guest. So where one leaves his horse at an inn, to stand there by agreement at livery, though neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the innkeeper hath a valuable consideration; and if the horse be stolen, he is chargeable with an action, upon the common custom of the realm. But as in the case at the bar, where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from hence for two or three days, although he saith he will return, yet he is at his liberty, and therefore is not a guest during that time, nor is the innkeeper chargeable as a common hostler for the goods stolen during that time, unless he make an especial promise for the safe-keeping of them; and the action should be grounded upon it."

In *Grinnel v. Cook*, 3 Hill, 485; s. c., 38 Am. Dec. 663, the court held: "An innkeeper is bound to receive and entertain travellers. If a traveller, having stopped at an inn, leave his horse

there and go out to dine or lodge with a friend, he does not thereby cease to be a guest. The same rule holds good, so far as relates to property, for the care and keeping of which the innkeeper is to receive a compensation, though the traveller leave the inn to go to a neighboring town, intending to be absent several days. Otherwise however in respect to inanimate property, from which the host derives no advantage."

"If a traveller leave his horse at an inn, he shall be deemed a guest, even though he lodges elsewhere; but not, if he leave any dead thing as luggage." Whart. Innkeepers, 76.

An innkeeper is not bound to receive the goods of a person who only desires the use of the inn as a place of deposit. Whart. Innkeepers, 76; *Bennett v. Mallor*, 5 T. R. 274; *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303.

The inquiry is suggested here, in the light of the citation from *Carter v. Hobbs*, *supra*: Did Wiatt visit the hotel, on the morning in question, "for purposes which the common law recognizes as the purposes for which inns are kept?"

That he did not stand in need of, and that he did not desire nor ask for, the present accommodations of that hotel, at the time he first stood at its office counter, is so overwhelmingly established by the proof, as to exclude every other conclusion.

[Omitting testimony.]

The one answer to the inquiry as to the purpose of his first visit at that hotel at two o'clock in the morning is, he sought it as a safe depository for his money, that he might be free to follow the promptings of his own will and pleasure for the balance of that night with no risk of its loss. This is the only rational conclusion from the testimony, and furnishes the true solution of his failure to register, of the absence of his name from all of the books of the hotel; of the fact that no room was assigned him; that he did not insist upon having a room assigned; that he did not ask or desire to be shown to a room; that it was after five o'clock in the morning when he returned to the hotel; and to all that transpired during his first visit there.

Innkeepers are not liable as such for goods deposited with them by any but guests of their inns. While an individual proprietor of an inn may incur a liability as bailee for the safe-keeping of goods which he has voluntarily undertaken to keep for others than guests, it is not within the course of employment of a mere clerk of such

Adams v. Young.

innkeeper to receive on deposit the goods of any except guests of the inn, and if he does so, it is a transaction between him and the owner, and no liability for the loss of such goods attaches to the innkeeper.

It will be observed that we have confined the consideration of this branch of the case to the simple question: Was Wiatt a guest of Hotel Emery at the time of the deposit of his money with its clerk? If he was a guest at that time, his subsequent conduct did not dissolve or affect the relation existing at the time of such deposit. If that relation did not exist at that time, his subsequent conduct could not create it; although if the direct evidence upon that issue had been involved in conflict, it would have been proper to consider such subsequent conduct in determining the actual relation of the parties at the time of such deposit.

As the evidence did not fairly tend to prove Wiatt a guest of the hotel at the time of the deposit of his money, there was error in rendering judgment for him, and in overruling the motion for new trial.

Judgment reversed and cause remanded.

ADAMS V. YOUNG.

(44 Ohio St. 80.)

Negligence — communication of fire — intervening building.

In an action of damages for the negligent communication of fire, it is no defense that the fire was directly communicated from an intervening building to the premises in question, which were two hundred feet from the building first ignited. (*See note, p. 795.*)

ACTION for negligent destruction of personal property in a dwelling-house by fire. The opinion states the point. The plaintiff had judgment below.

Isaiah Pellers and T. J. Godfrey, for plaintiff in error.

LeBlond & Loughridge, for defendant in error.

FOLLETT, J. Was the negligence of Adams the proximate cause of the loss sustained by Young? The law does not regard an in-

jury from a remote cause. There is no dispute as to the legal proposition; the difficulty is as to its proper application to the particular case.

The sustaining the demurrer to the second defense is the only complaint of the plaintiff in error. There is no complaint of the trial on the first defense, in which the jury found against the plaintiff in error, and in which the jury must have found that his negligence was the proximate cause of the loss of the goods.

Does the second defense show, as a matter of law, a bar to Young's recovery? This defense is that the fire which burnt and consumed the property was communicated to the house of Crawford by sparks and cinders from the stable, and from the house of Crawford to the house where the property was situated, and then to the property.

It is not claimed that this fire was not the same fire communicated to the stable by sparks from the smoke-stack, when Adams' agent negligently and carelessly fired up and started the machinery. So from the petition and answer, it is shown that the fire started by Adams is the fire that consumed the goods.

Adams does not aver or claim that there was any new agency or cause at any point of the line of this fire, and does not aver or claim that the "gale of wind" increased in force or changed in direction.

The stable and the houses were not causes of communicating the fire, but they were only conditions of the communication, existing when the fire was started. Strictly the law knows no cause but a responsible human will; and when such a will negligently sets in motion a natural force that acts upon and with surrounding conditions, the law regards such human actor as the cause of resulting injury. "As a legal proposition, we may consider it established, that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced from liability for such injury." Whart. Neg., § 85.

Adams does not aver his ignorance of the surrounding conditions, or that there was any thing unusual about them, or any change as to them.

The objection as to distance through the air is disposed of by the averments of the answer, that the fire was thus communicated, the surrounding conditions being as they were, and no other cause being

Adams v. Young.

shown. There is no averment this loss is not a probable and ordinary result of the negligence of the plaintiff in error; and this principle is an important test, if it is not the only test. Whart. Neg., § 150.

Ryan v. New York Cent. R. Co., 35 N. Y. 210, and *Pennsylvania R. Co. v. Kerr*, 62 Penn. St. 353; s. c., 1 Am. Rep. 431, have been referred to as decisive here. The courts rendering those decisions have sufficiently "distinguished and explained" them.

In case of *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420; s. c., 10 Am. Rep. 389, FOLGER, J., on page 427, says: "I do not understand * * * that the decisions in 35 N. Y., and 62 Penn. St., *supra*, put forth any new rule of law, or one which has not been acted upon and recognized, *pari passu*, with the recognition and growth of the principles upon which most of the cases above cited are based. In *Ryan's* case, the opinion of the court was that the action could not be sustained, for the reason that the damage incurred by the plaintiff was not the immediate but the remote result of the negligence of the defendant." He then says, *Kerr's* case is the same in material facts, principle and reasoning. And he then says, page 428, "I am of the opinion, that in the disposition of the case before us, we are not to be controlled by the authority of the case in 35 N. Y. more than we are by that of the long line of cases which preceded it." And the court there held, "He who by his negligence or misconduct creates or suffers a fire upon his own premises, which burning his own property spreads thence to the immediately adjacent premises and destroys the property of another, is liable to the latter for the damages sustained by him." And on the facts there, also held, "In an action for the damages, that the questions as to whether defendant was negligent in the use of its property, and as to whether the injury was a probable consequence of the negligent acts and omissions, were properly submitted to the jury."

In *Pennsylvania R. Co. v. Hope*, 80 Penn. St. 373; s. c., 21 Am. Rep. 100, Chief Justice AGNEW says, on page 379: "But let us examine the case of *Railroad Co. v. Kerr*, and it will be found to be free from much of the criticism expended upon it." "It was not held in *Railroad v. Kerr*, that when a second building is fired from the first, set on fire through negligence, it is a mere conclusion of law that the railroad company is not answerable to the owner of the second; or that if a fire is communicated from the locomotive to

the field of A., and spreads through his field to the adjoining field of B., A. may be reimbursed by the company, while B. must set down his loss to a remote cause, and suffer in silence;" thus answering *Fent v. T. P. Ry. Co.*, 59 Ill. 362, 358; s. c., 14 Am. Rep. 13, *infra*.

And in that case the court held, "Sparks from defendants' engine fired a railroad tie, from which rubbish left by the defendants on their road was fired, communicated with plaintiff's fence next to the road and spread over two fields, burned another fence and standing timber six hundred feet distant from the road. Held, that the proximity of the cause was for the jury.

"In such case the jury must determine whether the facts constitute a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of defendants."

In the opinion the chief justice says, page 378, "In determining this relation, it is obvious that we are not to be governed by abstractions, which in theory only cut off the succession. Abstractly each blade of grass or stock of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real but combustible division line. * * * It is at this point the province of the jury takes up the successive facts, and ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off or separated by a new and independent cause."

Some States, as Massachusetts and New Hampshire, have provided by statutes that railroad companies shall be liable for damage caused by fire communicated by its locomotive engines. And in *Perley v. Eastern R. Co.*, 98 Mass. 414, damage was recovered for injury to property situated half a mile distant from the railroad.

In the State of Kansas, damage has been recovered for injury to property situated many miles distant from the origin of the fire. *Atchison, T. & Santa Fe R. Co. v. Stanford*, 12 Kan. 354; s. c., 15 Am. Rep. 362. In case of *Atchison, T. & Santa Fe R. Co. v. Bales*, 16 Kan. 252, it was held: "Where fire, which is negligently permitted to escape from an engine of a railroad company, does not fall upon the plaintiff's property, but falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble and other combustible materials, and passes over the land

Adams v. Young.

of several different persons, before it reaches the property of the plaintiff, and finally reaching the property of the plaintiff at a great distance from where the fire was first kindled, sets it on fire and consumes it, held, that the negligence of the railroad company, in such a case, is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company."

In case of *Poeppers v. M. K. & P. Ry. Co.*, 67 Mo. 715; s. c., 39 Am. Rep. 518, sparks from the locomotive set fire to the prairie where the grass was rank. The wind was high and the fire extended three miles before night, then died down, and the next morning the wind rose and carried the fire five miles further, where the fire destroyed plaintiff's property. The court held, "that as the rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company from the consequences of its negligence in permitting the fire to escape; and that the fire was in fact one continuous conflagration, notwithstanding the lapse of time and the great distance over which it travelled before reaching plaintiff's property." In Missouri this may be correct.

In *Del., Lack. & West. R. Co. v. Salmon*, 39 N. J. Law, 300; s. c., 23 Am. Rep. 414, the court held, "Where one, by negligence or misconduct, occasions a fire on his own premises, or the premises of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal proposition, too far removed from his negligent act to involve him in legal liability." And *Ryan v. New York Cent. R. Co.*, and *Pennsylvania R. Co. v. Kerr*, *supra*, are disapproved.

The case of *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69, was fully considered, and the court held, "The maxim, *causa proxima non remota spectatur*, is not controlled by time or distance, nor by the succession of events. An efficient adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The maxim includes liability for all actual injuries which were the natural and probable result of the wrongful act or omission complained of, or were likely to ensue from it under ordinary circumstances. And *Ryan v. New York Cent. R. Co.* and *Pennsylvania R. Co. v. Kerr*, *supra*, are disapproved.

In the case of *Fent v. Toledo, Peoria & Warsaw Ry. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13, the opinion, delivered by Chief Justice LAWRENCE, disapproves of *Ryan v. New York Cent. & Co.* and *Pennsylvania R. Co. v. Kerr*, *supra*, and deals at length with remote and proximate causes. The court there held, "If fire is communicated from a railway locomotive to the house of A., and thence to the house of B., it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B., but that is a question of fact to be determined in each case by the jury under instructions of the court. * * *

"If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind — such a loss might fairly be set down as a remote consequence, for which the railroad company should not be held responsible."

In *Milwaukee and St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, the claim was that fire was negligently communicated from a steamboat of the company by sparks from the chimney to an elevator of the company built of pine lumber, and one hundred and twenty feet high, and standing on the bank of the river, and from the elevator to a saw-mill and lumber piles of Kellogg. The mill was five hundred and thirty-eight feet distant from the elevator, and the nearest pile of lumber was three hundred and eighty-eight feet distant from it. When the steamboat went alongside the elevator, an unusually strong wind was blowing from the elevator toward the mill and lumber. The case was from Iowa. The court held, "The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine in view of the accompanying circumstances. A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted unless it appear that the injury was the natural and probable consequence of the negli-

Adams v. Young.

gence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

In the case of *Hoyt v. Jeffers*, 30 Mich. 181, more than one building was burned by fire communicated by sparks from a mill chimney. As to the second building, the court held, "Even where such second building is at such a distance from the first that its taking fire from the first might not *a priori*, seem possible, yet if it be satisfactorily shown that it did in fact thus take fire without any negligence of the owner, or any fault on the part of any third party, which could be properly recognized as the proximate cause, and for which he could be held liable, the party through whose negligence the first building was burned cannot on principle be held exempt from equal liability for the burning of the second."

These numerous citations show many phases of this subject, and that each case must be determined by its peculiar facts, and so is largely within the province of the jury.

Here explosives are averred to have been in Crawford's house, but if they ever exploded it is not averred that any injury came from such explosion. There is shown no new cause operating after the fire was carried from the chimney of the mill on its destructive mission. The demurrer was rightly sustained, and the court did not err in affirming the judgment.

Judgment affirmed.

NOTE BY THE REPORTER.—See to the same effect, *Johnson v. Chic., etc., Ry. Co.*, 31 Minn. 57; *contra*, *Penn. Co., v. Whitlock*, 99 Ind. 16; s. c., 50 Am. Rep. 71, and note, 81.

Judge Thompson (Neg., p. 169), says: "The opinion of Chief Justice LAWRENCE, in *Fent v. Toledo, etc., Ry. Co.*, is an exhaustive and learned enunciation of the law as settled by the decisions in England and America." And of the *Kerr* and *Ryan* cases he says (p. 171): "They are condemned in every subsequent case in which they have been cited, outside of those States, and have been so qualified in those States in which they have been decided as to be practically overruled."

Sherman & Redfield (Neg., § 327a), says: "We doubt whether any of this limitation of damages can be sustained. It does not seem to be accepted in England or Massachusetts, and is difficult to support upon any intelligible principle." Written in 1874.

Cooley says of the *Ryan* case (Torts, 76), that it was apparently decided more upon a consideration of the hardship of the opposite doctrine than upon "a strict regard to the logic of cause and effect." "The negligent fire is

Cummings v. Kent.

regarded as an unity, it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would thus have intervened back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time. The slow match which causes an explosion after much time and at considerable distance from the ignition, and the libellous letter which is carried from place to place by different hands before publication, produces an injurious result which is as proximate to the cause and as direct a sequence as if in the one case the explosion had been instantaneous, and in the other the author had called his neighbors together and read to them his libel." No doubt the man who sets the stone rolling is liable for the direct injury to any number of different persons, but suppose the first person struck falls down the hill, and at the bottom strikes another, would the man who set the stone rolling be liable for the injury to the latter? That is a different question. Unless the doctrine of the *Kerr* and *Ryan* cases is law, the man who accidentally fired the cow-shed by tipping over the lamp in Chicago was liable for the conflagration of the whole city. Or suppose one should negligently keep a mad dog, which should bite another dog, and the virus should in like manner be communicated through six dogs to a man, would the keeper be liable to that man? Distance of space or time is nothing, it is true; but intervening and unexpected agencies of communication, through which space and time are bridged, are something to be taken into account.

CUMMINGS v. KENT.

(44 Ohio St. 92.)

Negotiable instrument — draft — parol evidence to vary liability.

Parol evidence of an agreement between payee and drawer that the drawer of a bill was not to be liable is inadmissible.

ACTION on bills of exchange. The opinion states the facts. The plaintiff had judgment below.

John W. Herron, for plaintiff in error.

Jordan & Jordans, for defendant in error.

OWEN, C. J. If the trial court properly excluded the evidence offered by the defendant below to prove that it was agreed, at the time the bills of exchange in suit were drawn, that he was not to be liable thereon as drawer, the judgment below should be affirmed.

Cummings v. Kent.

The real issue tendered by the answer was that Kent took the bills of exchange in payment of the debt of \$3,014.95 which was due from the defendant, Cummings, to him, and agreed to release the former from all liability for the same. A careful inspection of the answer fails to disclose any averment that Kent agreed to release Cummings from his liability as drawer of the bills, or that there was any agreement that the only purpose in drawing the bills was to effect an assignment of the debt. If we assume the facts alleged in the answer to be proved as fully as averred, they would still fall far short of establishing a defense to the action on the bills of exchange. They may have been taken in payment of the account, and Cummings thereby released from all liability thereon; but the action was not upon the account, but upon the bills given for its payment. The evidence offered was properly excluded, as being irrelevant to the issues joined.

We do not find it necessary however to rest our determination of the case solely upon this ground. Assuming for the purposes of the case, that the issues were broad enough to invite an inquiry into the facts which were sought to be proved by the evidence offered, was it competent to establish such facts by oral testimony?

The liability assumed by the drawing of a bill of exchange is clearly recognized by the law. The mere act of drawing a bill imports the most certain and precise contract, for presumed adequate consideration, that the bill shall be accepted and paid, and that if it is not, the drawer will pay it. *Wood v. Surrells*, 89 Ill. 107; *Chitty Bills*, 147. It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to or subtract from, the absolute terms of the contract. *Purs. Notes and Bills*, 501.

The evidence which the court excluded in the case at bar was offered for the purpose of proving that at the time of the drawing and delivery of the bills in suit, it was agreed between the payee and drawer that the latter should not be liable as such drawer. If this was not an attempt to contradict the plain terms of the contract as the law interprets it, it is not easy to conceive of a case which would present such a question.

Morris v. Faurot, 21 Ohio St. 155; s. c., 8 Am. Rep. 45, is cited to support the view contended for by Cummings.

This was a suit by the indorsee against the indorser of a promissory note. The defense was that the indorsement was not made in the regular course of business, but that the plaintiff had agreed with the makers to take up the note, and that "the indorsement was made with the express understanding and agreement that this indorsement was to be used by the plaintiff only as evidence to Cochran & McElroy that he had paid off their indebtedness on the note to the defendants, and that it was made for no other purpose whatever."

McILVAINE, J., says: "That parol testimony is inadmissible to contradict or vary the terms of written instruments, and that the contract of an indorser of a promissory note, whether the indorsement be in blank or otherwise, within the meaning of that rule, as general propositions of law are true, may be admitted for the purposes of this case. But the question in the case, as we understand it, was not as to the terms of the contract, or the nature or extent of the indorser's liability, but whether there was any contract at all out of which any liability could arise."

It will be seen that this case expressly recognizes the rule which the trial court, in the case at bar, applied in excluding the evidence offered "as to the terms of the contract, or the nature or extent of the liability" of the drawer.

Dye v. Scott, 35 Ohio St. 194; s. c., 35 Am. Rep. 604, is relied upon as decisive of the case at bar, in that it establishes the admissibility of the evidence which the trial court excluded. The proposition declared by the court in that case is: "Oral testimony is admissible to prove that the indorser, as between himself and the indorsee, at the time of indorsing a note in blank, waived demand and notice." We are not called upon, nor have we any disposition, to question the entire soundness of this proposition, and the language of GILMORE, J., which is relied upon by the plaintiff in error, must be read and construed in the light of the question before the court and not as declaratory of a rule which was not at all necessary to a solution of that question. The rule established by that case is supported by authorities which rigidly adhere to the principle which guided the trial court. 1 Pars. Notes and Bills, 584; Dan. Neg. Inst., § 1093; Edw. Notes and Bills, § 861; *Boyd v. Cleveland*, 4 Pick. 525; *Lane v. Steward*, 20 Me. 98; *Fuller v. McDonald*, 8 Greenl. 213; s. c., 23 Am. Dec. 499.

Wood v. Surrells, 89 Ill. 107, is an instructive case, presenting

Cummings v. Kent.

striking analogies to the case at bar. One of several judgment debtors gave a bill of exchange on a third person, whose acceptance was procured in satisfaction of the judgment. It was held that evidence of a parol agreement at the time of the drawing of the bill, to release the drawer from all liability on the draft, was inadmissible. Here the judgment was paid by the drawing and acceptance of the bill; but evidence of a contemporaneous parol agreement that the drawer was not to be liable as such, was excluded.

It was further held in this case, that the liability of a drawer of an inland bill of exchange is fixed by presenting the draft on the day of its maturity, and notice of its dishonor. It was also held that, "The rule is familiar, that an agreement cannot exist partly in writing and partly in parol, or that verbal terms or conditions cannot control the rights or liabilities of parties to commercial paper."

While there is not entire uniformity in the authorities upon the question, their decided weight will be found to support the principle that evidence is not admissible to prove a contemporaneous parol agreement that the liability of the drawer of a bill of exchange is not to be enforced. 1 Dan. Neg. Inst., § 80; *Martin v. Cole*, 104 U. S. 30; *Bigelow v. Collon*, 13 Gray, 309; s. c., 74 Am. Dec. 633; *Davis v. Randall*, 115 Mass. 547; s. c., 15 Am. Rep. 146; *Bartlett v. Lee*, 33 Ga. 491; *Day v. Thompson*, 65 Ala. 269; *Barnard v. Gaslin*, 23 Minn. 192; s. c., 23 Am. Dec. 499; *Crocker v. Getchell*, 23 Me. 392; *Fuller v. McDonald*, 8 Greenl. 213; s. c., 23 Am. Dec. 499; *Tankersley v. Graham*, 8 Ala. 247; *Stubbs v. Goodall*, 4 Ga. 106; *Wilson v. Black*, 6 Blackf. 509; *Holton v. McCormick*, 45 Ind. 411; *Stack v. Beach*, 74 Ind. 571; s. c., 39 Am. Rep. 113; *Woodward v. Foster*, 18 Gratt. 200; *Barry v. Morse*, 3 N. H. 132; *Heaverin v. Donnell*, 7 Sm. & M. 244; s. c., 45 Am. Dec. 302; *Heath v. VanCott*, 9 Wis. 516. This is also the rule in England. *Hoare v. Graham*, 3 Camp. 57; *Abrey v. Cruz*, L. R. 5 Com. P. 37; *Bell v. Lord Ingestre*, 12 Q. B. 317; see also *Forsythe v. Kimball*, 91 U. S. 291; *Specht v. Howard*, 16 Wall. 564.

Judgment affirmed.

*Ex parte Dalton.***EX PARTE DALTON.**

(44 Ohio St. 142.)

Constitutional law—contempt—refusal to produce books before legislative committee.

A standing committee on elections of a house of the legislature, with power to send for persons and papers, may command a clerk of a court of common pleas, having custody of a poll-book, to produce it on an investigation, although this may involve the removal of the book to another county than that of his office; and on his refusal such house may commit him for contempt.

HABEAS CORPUS. The opinion shows the case.

Baker & Goodhue, for petitioner.

Jacob A. Kabler, attorney-general, *George K. Nash*, and *Jesse L. Cameron*, for respondent.

OWEN, C. J. 1. It is maintained on behalf of the petitioner that neither the house of representatives nor its committee had power to command him to remove any of the poll-books committed to his custody from his office and take them out of his county. This claim is based upon the assumption that section 2961 of the Revised Statutes requires that the poll-books shall remain in his office and not be removed therefrom under any circumstances.

This section provides that: "After canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same and direct it to the clerk of the Court of Common Pleas of the county; and one of the judges (to be determined by lot, if they cannot otherwise agree), shall convey the same to the clerk at his office, within three days from the day of election; and the other poll-book shall be forthwith deposited with the clerk of the township, or the clerk of the municipal corporation, as the case may require, there to remain for the use of any person who may choose to inspect the same after the expiration of the time within which any legal notice of the contest could be given."

•

Ex parte Dalton.

It requires but a casual examination of this section to show that the contention of the petitioner proceeds upon a misconstruction of it; that the words "there to remain" have relation not to the poll-book which is to be conveyed to the clerk of the Court of Common Pleas, but to "the other poll-book," which is to be deposited with the clerk of the township or municipal corporation.

That this position of the petitioner is untenable, clearly appears from the provisions of sections 2998, 2999, and 3001, 3003, 3004 Rev. Stats. These sections are more fully considered in the third paragraph of this opinion. They clearly contemplate a trial before that branch of the general assembly to which a contest is taken on appeal, and the production before such house, or a committee acting for it, of the returns of an election which is being investigated.

The right of the house to command the production before it, or its committee, of the papers named in the subpoena, and of the witness to produce them, is clear.

2. It is further maintained in behalf of the petitioner, that even if it was lawful for him to produce before the committee at Columbus the poll-book demanded, the house had no power, upon his refusal to produce it, to commit him as a punishment for contempt of its authority.

The case of *Anderson v. Dunn*, 6 Wheat. 204 (decided by the Supreme Court of the United States in 1821), declared the doctrine that representative bodies in America possessed inherently the power to punish for contempt. For sixty years following this decision, its authority remained unquestioned in this country. The repeated and unqualified declarations of this principle by courts and text-writers are to be traced to this case. *Mourice v. Dyer*, 2 Greene, 165; *Yates v. Lansing*, 9 Johns. 395; s. c., 6 Am. Dec. 290; 1 Burr's Trial, 352; *United States v. Hudson*, 7 Cranch, 32; 1 Kent Com. 300; *United States v. New Bedford Bridge*, 1 W. & M. 401; *Tenney's case*, 23 N. H. 162; *State v. Copp*, 15 N. H. 212.

The later case of *Kilbourn v. Thompson*, 103 U. S. 168, is relied upon by counsel for petitioner as an authority in support of his position, and as overruling *Anderson v. Dunn*.

In the case of *Kilbourn v. Thompson*, the plaintiff had, on proceedings similar to those taken in the present case, been convicted of a contempt, and sentenced by the house of representatives of Congress to imprisonment. It appeared on the face of the proceed-

Ex parte Dalton.

ings, that the contempt consisted of his refusal to answer a question propounded by a committee of the house appointed by a resolution, which was set forth. This resolution directed the committee to investigate certain business transactions in which the United States government was interested simply as a creditor of one of the parties, and that the Supreme Court held that the preamble and resolution under which the committee was appointed showed upon their face that the investigation ordered did not have for its object any legislative action, or the impeachment of any officer of the government, but the collection of a debt owing to the government, a power which Congress could not exercise, but which was vested only in courts of justice; that in ordering such an investigation, the house of representatives exceeded the limits of its powers, and consequently the committee had no authority to require the plaintiff to testify before it. On this sole ground, the decision of the court was placed, but in arriving at this conclusion, several important points, which have a bearing upon the question now before us, were discussed in the highly instructive opinion of Justice MILLER.

It may be conceded that so far as *Anderson v. Dunn* declared the doctrine that representative bodies in this country possess, inherently, the general and unlimited power to punish for contempts, it is overruled by *Kilbourn v. Thompson*, but so far as it has application to the questions now before us, its authority remains unshaken by the latter case.

This is apparent from the following language of the syllabus of *Kilbourn v. Thompson*: "*Held*, that although the house can punish its own members for disorderly conduct, or for failure to attend its sessions, and can decide cases of contested elections, and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, where the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness — there is not found in the Constitution of the United States any general power vested in either house to punish for contempt."

In the course of a very learned and able opinion, Justice MILLER says: "Each house is by the Constitution made the judge of the election and qualification of its members. In deciding on these, it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may

Ex parte Dalton.

be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature."

Here is a recognition of the power which the house exercised in the case at bar.

The case of *McDonald v. Keeler*, 39 Hun, 563, which is relied upon by the petitioner, is not an authority against the power of the house to commit for contempt, a witness in an election contest, for the reasons (1) that as counsel concede, it was reversed by the Court of Appeals of that State (99 N. Y. 463); s. c., 52 Am. Rep. 49; and (2) that while denying the power of a branch of the general assembly to punish for contempt in the peculiar case before it, LEARNED, J., qualified the general rule in the following language:

"Here, then, we must notice that by the Constitution the legislature has certain judicial powers. Each branch is the judge of the qualifications of its own members. This power is judicial in character, though often partisan in fact. There is a power to remove certain judicial officers. There is a power of impeachment. These are judicial powers. They imply a decision on past occurrences, and a giving judgment accordingly. It may be therefore that in all actions of this kind, the senate and assembly may rightfully enforce the same power of punishing for refusing to answer questions which is exercised by courts. These cases therefore we exclude from consideration."

The Constitution of Ohio ordains (art. 2, § 6) that:

"Each house shall be judge of the election, returns and qualifications of its own members."

The house of representatives was exercising, through its committee, the power thus conferred, at the time of the commitment of the petitioner.

The power to enforce the attendance and testimony of witnesses, and the production of papers affecting the election of its members, is indispensable to the efficient exercise of the power conferred.

That the power to commit a recusant witness for contempt in disobeying the command of a subpoena issued in the due course of an investigation affecting the election of any of its members, is invested in each house, is now too firmly established to be considered a debatable question.

Ex parte Dalton.

Anderson v. Dunn, 6 Wheat. 204; *Kibbourn v. Thompson*, 103 U. S. 168; *McDonald v. Keeler*, 39 Hun, 563; s. c., 99 N. Y. 463; s. c., 52 Am. Rep. 49; *Rapalje Contempts*, § 2, and cases there cited.

3. Counsel for petitioner maintains, further, that the only power conferred by statute on each house to proceed against a disobedient witness for contempt of its authority is derived from section 52, Revised Statutes, and that the power therein attempted to be conferred is too vague and indefinite regarding the mode of punishment to be capable of legal enforcement.

Section 50, Revised Statutes, provides: "That a chairman may issue subpoenas;" section 51 provides to whom subpoenas shall be directed, and how served, and the form; and section 52 provides punishment for disobeying the subpoena, or refusing to answer, or refusing to produce books or papers.

Section 52 provides: "Whoever willfully fails to appear in obedience to such subpoena, or appears and refuses to answer any question pertinent to the matter of inquiry, or declines to produce any paper or record in his possession or control, shall be liable to the pains and penalties for contempt of the authority of the general assembly * * * according to parliamentary rules and usages in case of contempt; and the chairman of the committee before which such person fails to appear, or refuses to answer, or produce a paper or record, as aforesaid, on the order of the committee or a sub-committee, shall report the facts to the proper branch of the general assembly, on like order, issue a warrant for the arrest and conveyance of the witness before that branch, to answer for the contempt; and the sergeant-at-arms, or sheriff, to whom such warrant is directed, shall forthwith execute the same," etc.

Rules have been adopted by the house to effectuate the provisions of this section.

Counsel for petitioner repeatedly asserts, during his argument, that it is conceded that the only statutory power to commit for contempt is to be found in this section (52). By whom this concession is made we are not advised. Certainly, this court has not made, nor is it bound by any such concession.

On the contrary, we find that express statutory power is given to make the order by which the petitioner was placed in the custody from which he seeks to be discharged by the proceeding we are reviewing.

Ex parte Dalton.

Section 3003, Revised Statutes, provides, generally, for an appeal to, and contest before, either branch of the general assembly, of the right of a person declared elected thereto. Section 3004 provides that the provisions of sections 2998, 2999 and 3001 (relating to contests for county offices), shall apply to contests for seats in the general assembly. Section 2998 provides, that the officers authorized to take depositions may issue "*subpoenas duces tecum* for the production of the books, papers, ballots, or things relating to such election; and they may compel the attendance of witnesses, and the production of every thing named in the subpoenas."

Section 2999 provides that: "Whoever refuses to obey such subpoena *duces tecum*, or to produce any books, papers, ballots, or things in his possession, or under his control, named in such writ, shall be committed to the jail of the county by the justices or other officer; there to remain until he produces the things called for."

Section 3001 provides that: "On the trial either party may introduce oral testimony, or depositions of witnesses taken as provided in civil actions; and whenever any omission, defect, or error occurs in the proceedings of an officer, in declaring or certifying that a person was duly elected to an office, the same may be corrected by oral or other testimony offered at the hearing of any preliminary proceeding, or at the trial."

These provisions, having been thus engrafted upon those for contest for membership of either house, furnish specific warrant for the action of the house in the case before us. This renders unnecessary any further discussion of the provisions of section 52, or the rules of the house, so far as they relate to commitment of witnesses for contempt.

4. The questions we have been considering were incidentally involved in the case of *Dalton v. State*, 43 Ohio St. 652. This court there held that the jurisdiction conferred by the Constitution upon each house to "judge of the election returns, and qualifications of its own members," is supreme and exclusive, and that: "In a contest in either house, the broadest range is given contestants to purge the ballot and returns of the consequences of neglect, mistake, fraud and crime, from the opening of the polls to the final declaration of the result."

The pertinency of this language to the case before us is emphasized by the fact that it was used with reference, among other things, to the very paper (then before this court) whose production was

Manhattan Life Insurance Company v. Smith.

commanded by the subpoena issued in the case at bar. It was used to support the proposition that a contest before either house afforded a complete and adequate remedy for fraud, neglect, or crime at the election or in making up the returns thereof. If it be true that neither house of the general assembly has power to compel the production before it, or a committee acting for it, in the trial of a contest involving the election of a member, of the returns and other papers affecting such election, the declaration of this court in the case last cited is but a false pretense, and a contest in either house is not an adequate remedy for the contestant.

The parties to such a contest are entitled to the enlightened judgment of each member of the house upon the questions involved in the contest.

Where a full understanding of such questions requires a personal inspection of the returns of the election, it is the right of each party to the contest to ask that they be brought within reach of each member whose vote is to aid in the final determination of the contest. With the thoroughness of the investigation dependent wholly upon the pleasure or caprice of witnesses, and without the power to enforce their attendance and testimony and the production of papers, by such means, if necessary, as the house of representatives used in the present case, it would be worse than an absurdity to say, as did this court in the case last cited, that: "In a contest in either house the broadest range is given contestants to purge the ballot and returns of the consequences of neglect, mistake, fraud and crime, from the opening of the polls to the final declaration of the result."

Judgment affirmed.

MANHATTAN LIFE INSURANCE COMPANY V. SMITH.

(44 Ohio St 155.)

Insurance — life — husband for wife — change of beneficiary — notice.

An insurance policy was issued to a wife on the life of her husband, entitling the wife to have the profits applied on the premiums annually. The husband kept the policy and paid the premiums. The husband and wife separated, and the company knowing this fact, and without notice to the wife, entered into negotiations with the husband for a surrender and for the issue

Manhattan Life Insurance Company v. Smith.

of a new policy payable to his estate, pending which the husband died leaving a premium due and unpaid, of which the wife was not notified. *Held*, that the company could not forfeit the policy.*

ACTION on a life insurance policy. The opinion and head-note state the facts. The plaintiff had judgment below.

McGuffey & Morrill, for defendant.

John W. Herron and Nathaniel H. Davis, contra.

SPEAR, J. At the outset we inquire: Had the husband, independent of any relation as agent for the wife, power to surrender the policy? He could stop paying premiums. That would have left the wife to continue the policy in force for its full amount by herself making payment of premiums; or she could have declined to pay and received a paid-up policy for a lesser amount, and this she would do, not by the grace or favor of the company, nor yet by virtue of any new agreement with the company, but by force of the original contract and the law applicable thereto.

It is now too well settled to admit of dispute that a beneficiary, for whose benefit a promise has been made by one upon a sufficient consideration moving from a third person, may maintain an action upon that promise; and if the beneficiary has acted on the promise so as to have changed position, or acquired a vested right, the contract cannot be changed without his consent. The case at bar is a stronger case than the one supposed, in that the application was made in the name of the wife and the contract itself made directly with her, though the risk was on the life of the husband. There was value in the policy, and at least to that extent the wife's right in it was a vested right. She was the beneficiary named in it, and upon both reason and authority we think it clear that no new contract or arrangement of any kind which affects the vested rights of the beneficiary in the policy can be made with the company alone by the insured. Bliss on Life Insurance, sections 337, 345, 571, and the cases cited by counsel, abundantly sustain this position. We conclude that the husband, in this case, had no power to surrender the policy merely because he was the insured party and had paid premiums. Had he any other standing regarding the transactions which gave him such right? In the payment of premiums he,

* See *Nat. Life Ins. Co. v. Haley* (78 Me. 268), 57 Am. Rep. 807.

Manhattan Life Insurance Company v. Smith.

in law, was her agent. If he had the right to act for her at all it was because of this relation as agent. Was he her agent at the time he attempted to surrender this policy? and what was the company, with the knowledge furnished by the letters as to his attitude toward his wife, bound to understand? By his letter of April 27, in which he inquires if the policy could be transferred, he gave the company to understand that he was seeking a result on the face of the transaction inconsistent with her interests. This was, of itself, significant and suggestive. And when it was followed by the letter of May 3, giving the information that his wife had separated from him and sued for alimony, and renewing his request that the policy be made payable to his estate because he was obliged to provide her with alimony, and because she was no longer a wife to him, it is idle to claim that the company was not apprised of facts from which it was bound to presume that his relation of agent had ceased. He could not have made the fact clearer had he included a direct statement to that effect. The relation of principal and agent implies trust, confidence. Here was an antagonism and a direct effort to sacrifice her rights for his benefit. The company was bound to know that as agent he could not lawfully do that. The husband not having any authority then, either by reason of having paid premiums, or by his position as the insured in the policy, nor yet as agent for the wife, to make a surrender, it follows that the attempted surrender of the policy was inoperative, and that the rights of the beneficiary were not impaired by the attempt.

But the company claims, that independent of the question of surrender, there can be no recovery beyond the sum of \$810, because the policy was forfeited by the failure to pay the premium due June 4, 1880. To this it is replied that there could be no forfeiture without notice to the beneficiary, such as had been uniformly given during the entire life of the policy, and that she had not, up to the commencement of the suit, been notified either of the amount of the premium to be paid, or of any purpose on the part of the company to forfeit the policy. On this question of notice the company insists that the notice given the husband was, in law, a notice to the wife, for that whatever was the fact as to his agency at the time his letters to the company were written; they do not show when the separation took place, and for all that appears, it was after the notice of April 24, 1880, was received by him. We confess we are unable to perceive the force of this claim. As early

Manhattan Life Insurance Company v. Smith.

as the 29th of April, five days after the notice was mailed, the company was apprized that Smith was acting contrary to the interests of his wife, and seven days later a full disclosure of his purpose was made. In the light of these facts, and of the irresistible inferences to be drawn from them, it will hardly do to claim seriously that the company was justified in assuming that he was agent for the wife April 24th. As matter of fact, the alimony suit had then been pending about six months. It being shown therefore that notice to the husband was not notice to the wife, and it appearing further that she had no actual notice, we are led to inquire what effect this state of facts has upon the rights of the parties?

It will be borne in mind that by the contract Mrs. Smith was entitled to share in the profits of the company, and that as to part of these profits, they were paid out by annual dividends, the remaining portion being retained by the company and insuring to her benefit by accretions to the policy, and that the uniform custom had been that the company should give timely notice, not only of the date when the amount to be paid as premium would become due, but as well the amount of the dividend and the amount of balance to be paid in cash. What dividend in any year was declared, and what amount could be used to reduce the premium were facts known to the company, but not to the insured. Without this information the insured or beneficiary could not, in the ordinary course of business, know how much was to be paid as premium each year, and could not therefore pay it. The case is to be distinguished from one where the premium is a fixed amount; and from a case, slightly differing, where although there may be dividends which the policy-holder, at his option, may have applied as the premium, yet there is no agreement and uniform practice that the dividends are to be deducted each year from the premium and the balance only paid to the company. It may probably be safely conceded that in either of the two supposed cases the assured would have no right to depend upon a notice from the company, not even if the company had ordinarily sent such notice. For the very life of successful life insurance depends upon prompt payment of premiums, and their business would be thrown into utter confusion if companies had no means of protecting themselves by forfeiture for non-payment of premiums. But while this is true, the contract is nevertheless an entire one of assurance for life, and the

Manhattan Life Insurance Company v. Smith.

payment of the premiums, after the first, is not a condition precedent, but a condition subsequent, and the parties may deal in such way between each other as to estop the company from insisting upon a forfeiture where it would be inequitable for a forfeiture to be declared.

Can the company insist upon a forfeiture in this case? The premiums were paid regularly for sixteen years; the company undertook to make a new contract with a person wholly without authority to act for Mrs. Smith, ignoring her altogether; her residence was given in the application as at Cincinnati, and the presumption would be that she continued to reside there; the exact place of residence was not hard to find; the company had an agent in the city all the time, and could without trouble have given her notice, but no effort even of the slightest character was made to acquaint her with that which she, of all persons, was interested in knowing and entitled to know. Courts are liberal in construing transactions in favor of the avoidance of a forfeiture. There are no presumptions in favor of a right by forfeiture, for forfeitures are abhorred in equity, and are never favored in law. Upon the facts shown it appears manifest that this claim of the insurance company is inequitable, and we are of opinion that it is not maintainable in law.

A recent case, decided by the Supreme Court of the United States, is believed to entirely cover the question here involved as to the effect of failure to give notice. We refer to *Phanix Ins. Co. v. Doster*, 106 U. S. 30, and quote from it sufficiently to show its application to the case at bar. The policy was issued September, 1871, upon the life of Jackson Riddle, in consideration of the payment by the wife and children of the insured (who were named as payees in the policy) of the sum of \$215, and the annual payment of a like amount on or before the 20th of September, in every year during its continuance, and contained a stipulation that if the premiums be not paid on or before the day of maturity the company should not be liable for any part of the sum insured, and the policy to cease and determine, all previous payments being forfeited. The policy was upon the half-note plan, which gave the insured the right to discharge one-half of the first four premiums by notes, and upon the fifth and subsequent payments to have his dividends, if any, applied in reduction of the premiums. Notices were sent to the insured prior to the 20th of September, in 1872, 1873 and 1874,

Manhattan Life Insurance Company v. Smith.

showing when premiums became due, amount of cash to be paid, interest on the notes, and amount for which additional note was required. Prior to the 20th of September, 1875, notice to the insured was sent, which stated amount of dividend to be applied in reduction of that premium, interest to be paid on notes previously executed, and the sum to be paid in cash.

On the 6th of October, 1876, the insured lost his life in a railroad accident, leaving unpaid the premium due on the 20th of September, previous, though before starting from home he had made arrangements to pay the amount required as soon as notice was received. His residence and post-office for more than a year had been at Oxford, Ind., which was known to the company's general agent at Chicago. On the 4th of October, 1876, there was sent from the general agent's office, addressed, by mistake, to the insured at Fowler, Ind. (where he never resided), a notice similar to that given in 1875. This was received by a son of the insured the day the father was killed. On the 9th of October, 1876, the amount due was tendered to the company's general agent at Chicago. He declined to receive it, on the ground that the policy lapsed, by reason of nonpayment of premium due, the 20th of September, 1876.

On the trial in the Circuit Court the court charged the jury, among other things, to the effect that "if they found from the evidence that it had been the invariable custom of the company to transmit to the insured a statement of the amount of the premium due, after deducting the dividend, with a notice of the time when, the place where, and the person to whom, the premium could be paid, then the insured had good reason to expect and rely on such statement and notice being sent to him, and that if the company, by its managing agent, had notice of the post-office address of the insured before the usual time of sending out notice, but failed and neglected to transmit such statement and notice until the 4th of October, and the same did not reach him or the payees in the policy until the sixth, and that the insured or payees were ready and waiting to pay said premium when notice and statement should be received, and by reason of such failure to send the notice and statement, and of that alone, the premium due in September, 1876, was not promptly paid, and that in a reasonable time thereafter the payees tendered the full amount of the premium, then the policy did not lapse or become forfeited, notwithstanding the premium was not

Manhattan Life Insurance Company v. Smith.

paid on the day named in the policy, and in the life-time of the insured."

A judgment was rendered against the company and the case taken upon error to the Supreme Court. The opinion was delivered by Mr. Justice HARLAN, who in commenting upon this part of the charge, uses this language: "We are of the opinion that these propositions are substantially correct. Nor do we perceive that the rulings of the court below are in conflict with our decision in *Thompson v. Ins. Co.*, 104 U. S. 252. * * * The present case has features which plainly distinguish it from the *Thompson* case. In the former there was a tender of the premium within a few days after the death of the insured, and as soon as the payees ascertained the sum required to be paid. In the latter, the amount to be paid was fixed. It was not liable to be reduced on account of dividends, or for any other reason, and the insured therefore knew the exact amount to be paid in order to prevent a forfeiture of the policy. Now although the policy issued upon Riddle's life required payment annually of a specific sum as a premium, that stipulation must be construed in connection with the agreement set out in the application, that the premium might be discharged *pro tanto* by such dividends as were allowed to the insured from time to time. Whether the company, in any particular year, declared dividends, and what amount was available in the reduction of the premium, were facts known, in the first instance, only to the company, which had full control of the matter of dividends. It certainly was not contemplated that the insured should every year make application, either at the home office or at the office of its general agent in Chicago, in order to ascertain the amount of dividends. The understanding between the parties upon this subject is, in part, shown by the practice of the company. Independently of that circumstance, and waiving any determination of the question whether the forfeiture was not absolutely waived by the act of the general agent, in sending notice to the insured after the day fixed for the payment of the premium due September 20, 1876, it was we think the company's duty, under any fair interpretation of its contract, having received information as to the post-office of the insured, to give seasonable notice of the amount of dividends, and thereby inform him as to the cash to be paid in order to keep alive the policy. It did, as we have seen, give such notice in 1875, and received payment of the amount due after the date fixed in the policy. Within a reasonable

Manhattan Life Insurance Company v. Smith.

time after the notice for 1876 came, in due course of mail, to the hands of one of the payees, a tender of the amount was made to the general agent at Chicago. No such features were disclosed in the *Thompson* case, and they are, as we think, sufficient not only to distinguish the present case from that one, but to authorize the instructions of which the company complains. * * * Judgment affirmed."

Undue importance must not be given to the fact of preparation by the insured for the payment of premiums before leaving home. The date of leaving home is not disclosed, and for aught that appears the preparation may have been made after the 20th of September. At best his tendency was but to show readiness on his part to comply. The fact is not alluded to at all by Justice HARLAN in his comments upon the action of the court below. It will be observed that a point of difference in the two cases is that in the *Riddle* case tender was made; in this case it was not. But it must be kept in mind that a notice which the company's agent sent actually reached one of the beneficiaries the day of his father's death, and he had therefore the information on which to act. Mrs. Smith had no information, and the neglect of the company was the cause of that ignorance. The beneficiary in the *Riddle* policy was apprised of the sum to be paid and that it was due; the beneficiary in the *Smith* policy was kept in ignorance of that sum and of time for payment. There are other questions involved in the *Riddle* case, but they are not believed to at all affect the case before this court.

The action of the company in the case at bar was in effect a repudiation of its promise to pay the amount stipulated in the policy. Even had Mrs. Smith learned the amount and time of payment after the death of her husband, a tender would have been a useless ceremony. "On general principles, whenever the act of one party, to whom another is bound to tender money, services or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from technical performance of his agreement. The law never requires a vain thing to be done." *Iskum v. Greenham*, 1 Handy, 361. See also *Brock v. Hily*, 13 Ohio St. 310. Notice was essential to a forfeiture. The company gave none, and by its course of action waived the forfeiture which might have arisen from non-payment of premium due June 4, 1880, and it is now estopped from setting it up.

We are aware that the views herein expressed as to the effect of failure to give notice are not in accord with a number of reported cases, but they are directly supported by the decision of the highest court in the land, and inferentially by decisions of many other courts, and we believe they rest upon the firm ground of sound principles. There was no error in the instructions given the jury at the trial, nor in the refusals to charge as requested; and an examination of the record discloses no error in the admission or exclusion of testimony prejudicial to the company. It follows that the action of the court at General Term in overruling the motion for new trial and entering judgment on the verdict was not erroneous.

Motion overruled.

JOHNSON, J., did not sit in this case.

McCLELLAN v. FILSON.

(44 Ohio St. 184.)

Marriage — wife's funeral expenses.

The separate estate of a married woman is liable for the bill of a physician called by her in her last illness and for the funeral expenses.

THE opinion states the case.

Nesbitt & Martin, for plaintiff in error.

Little & Shearer, for defendants in error.

SPEAR, J. The facts shown by the record, so far as they are necessary to an understanding of the points decided, are as follows: Nancy McClellan, a married woman, died about January, 1879, testate, leaving an estate of her own, and a husband surviving her, who also had property. The will named as executor Wm. S. McClellan, a son of the testatrix, who upon the probate of the will, took out letters testamentary, and at once entered upon the discharge of the trust. As such executor he paid from the assets of the estate, as expenses of the last sickness, physicians' bills; also expenses of her funeral, and for a tombstone. The physicians who attended were called by the son (William S.) at request of the mother

McClellan v. Filson.

The coffin and other purchases for the funeral were made by the son. It does not appear that the husband took any action in the way of employing either the physicians or undertaker. The executor also claimed to have paid certain taxes on the lands of deceased during her life, a portion of them more than six years before the death of the testatrix.

To the account of the executor filed in the Probate Court asking credit for all these payments, Mary J. Filson, a daughter of Mrs. McClellan, and legatee under the will, filed exceptions, in which, among other grounds of exception, she urged as to divers items of taxes, that they were barred by the statute of limitations. The Probate Court sustained all the exceptions. On appeal to the Common Pleas by the executor, that court upon trial sustained the exceptions as to the charges for expenses of last sickness and of the funeral, and overruled them as to the tombstone and the charges for taxes. The District Court reversed the judgment of the Common Pleas as to the item of taxes, to which the statute of limitations had been pleaded, and affirmed the judgment of the Common Pleas in all other respects. To reverse this judgment of reversal the present proceeding in error is brought.

We think the executor was justified in paying the funeral expenses and those of the last sickness, and that he should have been allowed for such items in his settlement. The contention is that he was not so justified, because the expenses were a debt against the husband and the executor should have compelled the undertaker to look to him. As to expenses of the funeral, section 6090, Revised Statutes, provides that every executor shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in payment of debts: First. The funeral expenses, those of last sickness, and the expenses of administration. Second. The allowance made to the widow and children for their support for twelve months. Another section permits the executor to sell property of the estate, before letters testamentary are granted, to pay funeral expenses, but for no other purpose. If within the meaning of the statute the funeral expenses are to be considered as debts of the deceased woman there would seem to be reason for regarding the statute as imperative. They manifestly cannot be treated as contract debts, but that as regards the estate of a man, such expenses may be regarded as debts, nevertheless appears to be settled in this State. The statute speaks of them as debts. They are

classed under the same head as the allowance to the widow for a year's support. In the case of *Allen v. Allen*, 18 Ohio St. 234, where the question was directly made, the court sustained the action of the court below, where the allowance was treated as a debt, and held that "the allowance of a sum of money to the widow and child, under section 45 of the Administration Act, is classed among the debts of the deceased to be paid in the order specified in that section." If allowance for a year's support of widow is a debt it follows that funeral expenses are equally so. But as before stated, the debt does not rest upon contract. The inability of a married woman to bind herself by contract generally therefore furnishes no reason why her estate should not be bound. If the statute applies to the estate of a married woman it is bound; if it does not it is not bound. In terms it does apply. The language is, "every executor and administrator shall pay," etc. Unless there is good reason founded upon principle why the married woman's estate should be excepted, then no exception should be made. It is urged that such good reason is found in the fact that at common law there is a duty upon the husband to dispose of the body of his deceased wife by decent sepulture in a suitable place. This is conceded, and it is not intended here to weaken the force of that duty, nor to impair the liability of the husband for the expenses of such burial. But the husband may be without means and unable to procure the services of those whose business it is to bury the dead, though the wife leave an abundance. What shall be done in such case? Shall the body remain unburied? If in such circumstance it is proposed to resort to the wife's estate for such expenses, it must be upon some principle, some rule. What shall it be? We have seen that the law of contract does not aid. She cannot, any more than a deceased husband as to his funeral expenses, be presumed to have contracted. Plainly then it must be by the force of legislation. That we have, and if we apply it in any case to the estate of a deceased married woman, it is difficult to see why, upon principle, it should not be applied to all. If we undertake to make arbitrary exceptions and distinctions, then the rule fails, for if it cannot rest upon the doctrine of a statutory debt, and charge upon the estate, it is not easy to find satisfactory foundation for it. Besides, if the application of the statute be limited to cases where the husband is insolvent, then we impose upon the one who spends time and money upon the con-

McClellan v. Filson.

duct of the funeral the burden of first exhausting the liability of the husband by suit, or at least demonstrating his insolvency. A decent regard for the proprieties of the situation would seem not to require this.

We think the statute was based upon a well recognized necessity, and that such debts may be regarded as created by statute from necessity, and as a charge upon the estate, the same as the necessary expenses of administration, and the statute as furnishing the rule of liability. *Patterson v. Patterson*, 59 N. Y. 574; s. c., 17 Am. Rep. 384. The burial of the dead is a matter of necessity. The public health requires that it be done, and a proper public sentiment equally requires that it be done decently. *Rex v. Stewart*, 12 Ad. & Ell. 773 "The estate in the hands of the executor, is bound by law for the payment of the expenses of the decent interment of the dead." *Hagood v. Houghton*, 10 Pick. 154. The statute of Massachusetts is similar to that of Ohio, and the court is here speaking of the effect of the statute. It is clear that the expense should be required to be met by any estate which the deceased may leave. Is there any reason for saying that this most reasonable requirement should not apply where the deceased is a married woman? As before stated, we regard the liability as resting on the statute, and upon that wholly. This must have for its basis, in large measure at least, considerations of public policy arising in the necessity of the case. That the dead might have proper sepulture, a clear, easily understood provision as to recompense for the expense was required. That provision we find in the statute. The question then is, do not considerations of public policy apply as well to the case of a married woman as to a man? The necessity in the individual instance may or may not be as great, but where is the difference in principle?

Divers authorities are cited by counsel for defendant in error, but we find none presenting the precise question presented here as to the funeral expenses. *Sears v. Giddey*, 41 Mich. 590; s. c., 32 Am. Rep. 168, is especially relied upon. In that case the surviving husband, with the son of a deceased wife by a former marriage, went together to the undertaker's and there ordered the casket and other goods for the funeral. Nothing was said about payment, or who was to be charged. The charge however was made to the husband, and the credit apparently given to him. The action was by the undertaker against the husband on the account. He sought

to defend, on the ground that the wife had property which she had willed to the son, and therefore he should pay. The court held, and we have no doubt rightly, that the husband must pay. In deciding the case, COOLEY, J., uses this significant language: "A funeral cannot be delayed for judicial inquiries to determine upon whom the moral obligation to proceed with it rests most heavily." In other words the undertaker may conduct the funeral decently and in order, and look to such person as ought to pay for his recompense. In that case it was the husband. In *Gunn v. Samuel*, 33 Ala. 201, an insolvent husband called in the plaintiff, a doctor, to attend his sick wife, her children and slaves. The wife was not consulted and gave no order. During her last illness she requested that a slave be sold to pay the doctor's account. The court held that it being the legal as well as moral duty of the husband to furnish medical attendance for his sick wife, a legal liability rests on him to pay, and her request did not impose an original liability or make her estate responsible, though if she had made a contract originally, express or implied, to pay the doctor, he would be entitled to recover. *Smyley v. Reese*, 53 Ala. 89; s. c., 25 Am. Rep. 598, is perhaps a stronger authority for defendant in error. In that case the husband, as administrator of his deceased wife paid the expenses of her funeral from the assets of the estate and asked to have the amount allowed in settling his accounts, which was refused, the court holding that the statutes of that State "creating the wife's statutory estate do not absolve the husband from his common-law obligation to furnish suitable sepulture for his wife," and that the administrator, in paying the funeral expenses, was but paying his own debt. The question of payment by an executor, not the husband, who has ordered the expenses, is not in that case. A holding contrary to the doctrine of the last case was made in *Gregory v. Lockyer*, 6 Maddock, 90, where the husband having paid the funeral expenses of the wife, and made a claim before the master to have them repaid by the executor from the separate estate of the wife, the separate estate was by decree ordered to be applied in payment.

The question is not simply whether the husband is liable as between him and the undertaker, but may not the estate of the wife also be liable, and may not the executor, having ordered the expense, be justified in paying the claim from that estate? If not, then a woman may die leaving thousands in lands, money and

McClellan v. Filson.

bonds, and if she happen to leave a husband, and he insolvent, the body may lay uncared for until some charitable friend comes to the rescue, or it be taken care of and buried by the town. Public decency and a just regard for an enlightened sentiment forbids.

True, the wife's property may not be taken for the husband's debt. But if the debt may be treated, as we think in this case it may be, as well as that of the wife as of the husband, it would not seem inequitable to allow her estate to bear the burden, though that does serve to exonerate him. At common-law the husband and wife were one, and that one was the husband. Not so now. The common-law right in and power over the wife's property by the husband is almost entirely taken away by our legislation. All estates and property, including rights in action belonging to her at marriage, or which come afterward by conveyance, gift, devise or purchase with her separate money or means or due as wages of her personal labor, or growing out of the violation of her personal rights, together with rents, incomes, issues, and profits, are her separate property. As to the real estate she may rent it for three years, and by will dispose of it entirely at her decease, and the personal estate she may control and dispose of absolutely without the husband's consent. And as to all this separate property she may sue and be sued as if she were unmarried. He has no control whatever over the personal property, except it be reduced to his possession with the express assent of the wife, and mere care, occupancy and use is not to be deemed a reduction to possession unless by the terms of the express assent full authority is given him to dispose of it for his own use. Curtesy initiate, as it existed at common law, is now held not to exist in Ohio, and the right of curtesy is conferred only on surviving husbands in estates of which the wives died seised. It appears plain by this that the relations of the husband and wife as to property have greatly changed in this State by statute, and that much of the reason for the rule that the husband's liability should be held to be so exclusive as to make impossible the subjection of the wife's separate estate to payment of expenses resulting from her necessities has vanished with the change. If the reason for the rule is in large measure gone because of these statutes, we may with some willingness be ready to see the rule, by virtue of other statutes, in equal measure, disappear.

As to the physicians' bills for attendance during last sickness, the record shows that they were incurred by direct procurement of

McClintock v. Wilson.

the deceased. That they were for her benefit admits of no doubt. She had the power to make the same a charge upon her separate estate. And while there are many reasons for saying that such expenses are made by the statute debts against and charges upon the estate of the deceased, in like manner as funeral expenses are, there is the additional consideration that the charge is also made by the deceased herself.

We expressly disclaim any purpose of deciding what is not before us. We hold that under the circumstances the executor had the right to follow the statute; to pay the physicians' bills and the funeral expenses from the estate of the testatrix, and having paid them has now the right to be allowed for such payment.

No question is made here as to the tombstone. The court of Common Pleas approved of that item and ordered it paid. The District Court affirmed the judgment as to that, and there the matter was allowed to rest. Regarding the items of taxes, we find sufficient ground in the record to warrant a reversal of the finding and judgment of the Court of Common Pleas by the District Court irrespective of the question of the statute of limitations, and we express no opinion upon the question raised by the exceptions based upon the statute. The District Court affirmed the judgment below as to all the items of taxes except the first twelve, and no one asks a reversal of that action.

It follows that the judgment of the Court of Common Pleas sustaining the exceptions to the charges for funeral expenses and of last sickness, represented by vouchers, one three, four, five and six, and of the District Court affirming such judgment, will be reversed, and the judgment of the District Court as to the items of taxes represented by voucher number ten, in part reversing the judgment of the Common Pleas and in part affirming the same, is affirmed. The Probate Court will be directed to allow to said executor in his settlement the items represented by vouchers one, three, four, five, six, seven, and all items of taxes except the first twelve. The costs of this proceeding in error are adjudged against both parties in equal proportions.

Judgment affirmed.

James v. Allen County.

JAMES V. ALLEN COUNTY.

(44 Ohio St. 323.)

Master and servant — discharge — remedy.

Where a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future installments, but only for breach of contract, and one recovery is a bar. (*See note, p. 828.*)

ACTION for wages. The opinion states the facts. The defendant had judgment below.

Isaiah Pillars and Prophet & Eastman, for plaintiff in error.

Mead & Townsend, for defendant in error.

SPEAR, J. This action is brought to recover for wages claimed to be due from the defendant to the plaintiff upon a contract made December 13, 1881, whereby in consideration that plaintiff would faithfully and diligently serve the defendant as superintendent of the stone and brick work in the construction of a court-house then in process of erection at Lima, until the stone and brick work should be completed, etc., the defendant agreed to employ plaintiff as such superintendent during the period aforesaid, and to pay him for his services at the end of each and every month the sum of \$100. The petition avers that the plaintiff entered upon the employment and discharged the duties thereof until April 6, 1882, when although the stone and brick work was not completed and the plaintiff was and has since been ready and willing to perform all the conditions of said agreement upon his part, the defendant refused to allow him to do so, and to pay him therefor, and discharged him therefrom without any reasonable cause, and has since hitherto refused to employ plaintiff for the remainder of said term. On the 18th day of August, 1882, plaintiff duly requested defendant to pay him his wages due him for his services upon and by reason of said contract for the period of two months from the 13th day of June, 1882, to the 13th day of August, 1882, which defendant refused to do, whereby plaintiff has lost the wages he otherwise would have obtained from said employment from said June 13, 1882, to August 13, 1882, to his damage in the sum of \$200, for which with interest from August 13, 1882, he asks judgment.

The answer of the defendant sets up in bar an alleged former recovery for the same cause of action, between the same parties upon the same contract at the October term, 1882, of the Court of Common Pleas of Allen county, at which term a judgment upon the merits was rendered in favor of the plaintiff for \$205.30. The petition of the plaintiff in the former case is set out and is identical with the petition in the present case except as to time, the pleader averring in the first petition loss of wages from April 13, 1882, to June 13, 1882, and asking to recover for that.

To this answer a demurrer was interposed, which was overruled by the Court of Common Pleas, and judgment entered for defendant, which judgment was affirmed by the District Court. To reverse this judgment of affirmance the present action is prosecuted in this court.

The question presented is whether under such a contract as is here set out, the employee can after being discharged, nothing being due him for wages actually earned, maintain an action for each installment as though earned, upon an allegation of readiness to perform the work; or whether his action is simply one for damages for the employer's breach of contract, and he is limited to one action and one recovery for such damages.

If he can have his option as to these remedies then the cause of action in the first petition was not the same as in the present one, and the former judgment would not be a bar; if he cannot, but is limited to the last-named remedy, to-wit: to damages for breach of the contract, then if both are based upon the same breach, it would follow that they are identical, and that one recovery would necessarily exhaust the plaintiff's remedy, and so the former recovery would be a bar. There is but one dismissal, but one breach pleaded. The dismissal was one act. And as to recovery of damages for that, plaintiff could not split up his cause of action, recovering a part of his damages in one suit and the remainder afterward. He must include all that belonged to that cause of action in his first petition so that one suit and one recovery should settle the rights of the parties. It would be at his own risk and peril if he negligently or ignorantly omitted a part of what might properly have been embraced in the cause of action in his first suit. His mistake, if he made one, might be matter of regret, but that could not change the rule of law.

The contention in support of plaintiff's claim is, that neither ac-

James v. Allen County.

tion was brought to recover damages for breach of contract on the part of the board, but that the plaintiff, having his option, upon being discharged, either to regard the contract as broken by the conduct of the employer and sue immediately for damages for its breach, or treat the contract as subsisting for all purposes and maintain an action for each installment as it became due, chose the latter, and this he might do, because having been discharged without fault on his part, his rights were not lessened, nor was he bound to treat the contract as at an end. Having this choice of remedies, it is insisted, one suit to recover upon installments past due at the commencement of the action, and judgment thereon would not bar a future recovery upon installments coming due thereafter. A contrary view, it is argued, would entail great injustice. Under it the employee would be compelled, unless he were content with such meager damages as he could prove immediately after his discharge, or at most with less than his real loss, to wait until all were due before recovering any thing, and inasmuch as the object in contracting for pay by the month probably was that he might thus support himself and family, they would be left to suffer while waiting for the last installment to become due, and he would thus be driven, in any event, to unreasonable hardships and to a sacrifice of his rights, because of the wrongful act of the employer, a condition of affairs which the law would not justify.

That the doctrine contended for appeals strongly to the feelings, and is not without plausibility, would seem to be apparent from the statement, and that it has met with the favor of courts in several instances, is apparent from an examination of the cases cited by counsel. Still the question remains, does it rest upon solid foundation? The first case in order of time is that of *Ganrell v. Pontigny*, 4 Camp. 375, decided at *nisi prius* at Sittings after Hilary term of the King's Bench, in 1816, by Lord ELLENBOROUGH. Plaintiff was clerk for defendant at £200 per year payable quarterly. August 11th defendant discharged plaintiff and paid him for half quarter between 1st July and 15th August. Plaintiff denied the power to discharge and offered next day to continue work, which defendant declined. Lord ELLENBOROUGH's decision is as follows: "If the plaintiff was discharged without sufficient cause, I think this action is maintainable. Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was

James v. Allen County.

therefore indebted to him for work and labor in the sum sought to be recovered."

John Wm. Smith, in his note to *Cutter v. Powell*, 2 Smith Lead. Cas., part 1, says that a servant wrongfully dismissed has his election of three remedies. First, a special action for breach of contract, and this remedy he may pursue at once; second, he may wait until the termination of the period for which he was employed, and then perhaps sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service, and he cites *Gandell v. Pontigny*.

Two cases are cited from the Supreme Court of New York, where a similar doctrine is held. In *Huntington v. O. & L. C. R. Co.*, 33 How. Pr. 416; s. c., 7 Am. Law Register (N. S.), 143, decided by JAMES, J., the holding is that "where a person employed for a certain time, at a fixed salary, payable monthly, is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due." In the case of *Thompson v. Wood*, 1 Hilton, 96, INGRAHAM, J., says: "Where an agreement of this kind is broken, the person employed has his election, either to sue for his wages as they become due from time to time, or to bring one action for damages for the breach of the contract." This holding that the employee may sue for wages as they become due from time to time was not necessary to a decision of the case, and was apparently based upon the holding of Lord ELLENBOROUGH, before quoted. *Strauss v. Meertief*, 64 Ala. 299; s. c., 38 Am. Rep. 8, is to the same effect. BRICKELL, J., in deciding the case, says: "It is not matter of doubt, that when a contract is made for personal services, for a particular term, at stipulated wages, if the party employed is, without cause, discharged during the term * * * he is not compelled to accept the breach of his employer as a termination of the contract; he may elect to treat it as continuing, and keeping himself in readiness to perform the contract as his part, may recover the wages due on the expiration of the term. And if the wages are payable by installments, he may sue for and recover each installment as it becomes due. Other cases by the same court hold a like doctrine, and it seems to have been accepted by the courts of Mississippi, Missouri, Illinois and Wisconsin.

The decisions in these cases appear to rest upon the doctrine of "constructive service." In several of them it is adopted in words;

James v. Allen County.

in others the principle is assumed without designating it by that title. If that is not their basis it is difficult to see that they have any. The theory of that doctrine seems to be that inasmuch as the employee holds himself ready to do the work, therefore he has done the work; that readiness is, for all purposes, equivalent to performance. For the purpose of allowing a recovery in some amount his readiness to do and tender of performance may have the effect of performance to the extent of putting the employer in the wrong, but how can it be said, in truth, that he has done the work? that he has performed? The claim is based upon a fiction, an untruth. There is no acceptance of the services; there is no delivery of them; the defendant has not had the benefit of them; he has not had value received, and upon what principle is it that in law he is liable for the agreed price when he has not received the commodity which he agreed to buy, and the other party has not parted with the commodity which he agreed to sell? The doctrine of "constructive service," as applied to a case of this character, is one beset with difficulties. It requires a plaintiff to assume that to exist which in fact has no existence. He is demanding wages when he has rendered no service. The doctrine contradicts the very term itself. How can he truthfully aver, as in *indebitatus assumpsit*, that the defendant is indebted to him for work and labor done? Averring it, how could he prove it? But aside from the matter of pleading and proof, in order to recover upon the strength of this doctrine, the employee must not only be willing to perform on his part, but must hold himself in readiness to perform. This implies that he will remain idle. Public policy, not to say public morals, forbids the encouragement of an idle class. Being subject to the universal rule that a person injured by the act of another is bound to use ordinary diligence to make the damage as light as may be, the discharged employee must use ordinary care to obtain employment. He may not be required to seek elsewhere, or to engage in a different industry. But he is bound to use ordinary effort to obtain similar employment in the same vicinity; at least if such employment is offered he is bound to take advantage of it. It would be a direct encouragement to idleness to hold that he who may have, but refuses, similar service, is entitled to full compensation the same as though he performed full labor. This rule stands squarely across the path of "constructive service." For if the workman is bound to accept employment of another employer how

can he continue ready to resume work under his former employer? A learned writer, whose valued paper in support of the doctrine of "constructive service" is cited by counsel, uses this language: "The doctrine of constructive service however does not permit an employee who has been wrongfully discharged to remain willfully idle during the period for which he had been engaged." A most singular conception of the ground work of the doctrine, it seems to us. Being actually at work for B., how can he be constructively at work for A.? Being required to hold himself in readiness to resume his work for A., how can he engage with B.? Engaging with B., how can he be ready to resume work with A.?

"Constructive service," as here sought to be applied, never had, as we think, support in principle, and the support derived from authority is at least very considerably impaired. The case of *Gandell v. Pontigny*, after being followed in several cases in England, was overruled in *Archard v. Hornor*, 3 Car. & P. 349, which was approved in *Smith v. Hayward*, 7 Ad. & Ell. 544, and in the later case of *Goodman v. Pocock*, 15 Ad. & Ell. (N. S.) 576. To like effect will be found *Beckham v. Drake*, 2 H. L. 606, and *Emmens v. Elderton*, 4 H. L. 645. Mr. Smith's second proposition in his notes to *Cutter v. Powell* is expressly disapproved in *Goodman v. Pocock*, ERLE, J., observing: "As to the other option referred to by Mr. Smith, I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service after dismissal. I think the true measure of damages is the loss sustained at the time of the dismissal." And in *Classman v. Lacoste*, 28 E. L. & E. 140, a still later case, Lord CAMPBELL says: "But if the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole gravamen that he suffers by such breach of contract, and that he may receive therein all the damages that may inure to him in consequence." So that it may not be too much to say, that the doctrine of "constructive service" has, in England, where it had its origin, been repudiated, and the law there established that a servant wrongfully discharged has no action for wages unless something is due for past services actually rendered, and as to any other claim on the contract it is for the breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common

law action of *indebitatus assumpsit*. Nor are the cases in New York heretofore referred to now authority in that State. For this see *Moody v. Leverick*, 4 Daly, 401, where the holding is to the effect that a servant wrongfully dismissed cannot wait until the expiration of the period, and then sue for his whole wages on the ground of constructive service, his only remedy being an action for breach of contract of hiring. Also, *Howard v. Daly*, 61 N. Y. 362; s. c., 19 Am. Rep. 285, where *Gandell v. Pontigny*, *Thompson v. Wood*, and the cases in Alabama, Mississippi, Missouri and Wisconsin are distinctly disapproved, and the doctrine of "constructive service" declared to be "so opposed to principle, so clearly hostile to the great mass of authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. * * * The doctrine of constructive service is not only at war with principle, but with the rules of political economy, as it encourages idleness, and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor." The cases of *Chamberlain v. Morgan*, 68 Penn. St. 168; *Willoughby v. Thomas*, 24 Gratt. 522; *Whitaker v. Sandifer*, 1 Duval, 261; *Chamberlin v. McCallister*, 6 Dana, 352, and *Miller v. Goddard*, 34 Me. 102, show that a like view is held by the courts in those States, while Wood's *Mayne on Damages*, 317, 323, and Wood's *Master and Servant*, 246-7, indicate that that author considers the great weight of authority to be in the same direction.

On page 246 of the latter work Mr. Wood uses the following emphatic language: "It (the doctrine of constructive service) was finally exploded, and the doctrine established that a person wrongfully discharged could not, by simply holding himself in readiness to perform his contract, be regarded as having in fact performed it, and thus be entitled to sue for and recover his wages for the entire term, but that he must be restricted in his recovery to the amount of his actual loss. The action in such cases is not for wages, but for damages for breach of the contract. It cannot with any propriety be claimed that an action for wages can be sustained when the servant has in fact rendered no service. Such a doctrine is in defiance of the meaning of the term, and rests upon no solid foundation either in principle or policy." See also an instructive paper by Mr. Thornton, of the Indianapolis bar on this subject, in 8

Southern Law Review, 432, and for a full discussion of the present case, see the able opinion of the judge who presided in the Common Pleas, reported in 9 Week. Law Bull. 186.

To sustain the doctrine of "constructive service" would be in effect to hold that the contract is one which could be enforced specifically, for if after discharge; and after the employer had repudiated the contract on his part and laid himself liable to full damages for its breach, the employee could treat the contract as subsisting in such sort as to recover upon installments as wages earned, when in fact they were not earned, and recover as each came due, the result would be a specific performance of the contract, and that too by a multiplicity of suits. Surely no lawyer would seriously ask a court of equity to specifically enforce a contract, which in its nature gives to the aggrieved party so plain and full a remedy at law in an action for damages.

As a result from the authorities, as well as upon principle, we are satisfied that in such a contract as the one in the case at bar, where the employee is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employee has, whether he bring it at once or wait until the entire period of hire has expired, is one for damages for the breach of the contract, and the measure of damages will be the loss or injury occasioned by that breach, and one recovery upon such claim, whether the damages be denominated loss of wages, or damages for breach, is a bar to a future recovery.

Judgment affirmed.

NOTE BY THE REPORTER. — See *Richardson v. Eagle Machine Works*, 78 Ind. 422; s. c., 41 Am. Rep. 584.

In *Saxonia M. & R. Co. v. Cooke*, 7 Colo. 569, it was said: "When a servant is discharged without a sufficient legal excuse before the expiration of his term, he has his choice of two remedies: he may treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach, or in some cases he may defer suit until the end of the term, and sue for the actual damage he has sustained, which however can in no case exceed the wages for the entire term."

In *Isaacs v. Davies*, 68 Ga. 169, it was held that if a servant be employed for five months at a specified rate per month, payable monthly, and pending the employment be wrongfully discharged, he may in his option sue at the end of each month, and a recovery for one month will be no bar to a suit at the end of the next month. The court said: "Had Isaacs continued Davies in his

Robinson v. Kanawha Valley Bank.

service and failed or refused to pay him at the end of each month, no one would question his liability to suit and judgment. If then he discharged him wrongfully, he did not and could not thereby discharge himself from liability. Isaacs cannot set up his own breach of the contract to discharge himself from its performance."

Howard v. Daly, 61 N. Y. 362; s. c., 19 Am. Rep. 285, was followed in *Weed v. Burt*, 78 N. Y. 192.

The case of *Chamberlin v. Morgan*, 68 Penn. St. 168, does not hold the doctrine of the principal case to which it is cited, but by implication recognizes the opposite.

In *Willoughby v. Thomas*, 24 Gratt. 522, cited in the principal case, it was held that, "if Thomas had been discharged the day after he was employed, without fault on his part, *but on the next day obtained as good or better employment for the year*, although he would be entitled to a recovery against his employers for breach of contract on their part, he certainly would not be entitled to full wages for the year as the measure of damages," and the doctrine of *Byrd v. Boyd*, 4 McCord, 246; s. c., 17 Am. Dec. 740, was approved, "that where a planter without cause turns away his overseer at a season of the year when it is impracticable to get employment, the overseer is entitled to the stipulated wages for the whole time." Thus making the remedy dependent on the ability to get other employment.

Chamberlin v. McCallister, 6 Dana, 352, was not a case of master and servant, and monthly or weekly wages, but of a contract for the plastering of several houses, at a certain price per yard, and no payment to be made until completion. *Whitaker v. Sandifer*, 1 Duv. 261, founded on *Chamberlin v. McCallister*, was a contract of service for a year, the wages payable at the end of the year. *Miller v. Gaddard*, 34 Me. 102; s. c., 56 Am. Dec. 638, was a case where the plaintiff voluntarily quit the service, and is not at all in point.

Clearly opposed to the principal case are *Atmfield v. Nash*, 34 Miss. 361; *Gordon v. Brewster*, 7 Wis. 355, and *obiter*, *Boose v. Pac. Railroad*, 33 Mo. 212.

ROBINSON V. KANAWHA VALLEY BANK.

(44 Ohio St. 441.)

Negotiable instrument — bill of exchange — acceptance by agent — parol evidence

The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co.," Held, that the acceptance was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him, parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant intended to bind the drawer as his principal, and that this was known to the plaintiff when it acquired the paper.

ACTION on a bill of exchange. The head-note states the case. The plaintiff had judgment below.

Lincoln & Stephens, for plaintiff in error.

W. H. Mackoy, for defendant in error.

MINSHALL, J. It is apparent that the question presented is precisely the same as would have arisen on a demurrer to the answer, and we shall so treat it. Evidence as to the meaning of the initials, without the other circumstances, could in no way vary the rights and liabilities of the parties. If the facts stated in the answer constitute a defense, the defendant should have been permitted to prove the same, as he offered to do by the evidence ruled out. If not, then there was no error in rejecting it, and the judgment should be affirmed.

There is nothing in the answer to the effect, that at the time Robinson accepted the bill, he did not have funds of the drawer in his hands applicable to the payment of the bill at its maturity, or that he did not expect to have, and that this fact was known to the plaintiff when it became the owner of it. It is entirely consistent with the hypothesis that he was acting as the agent of the drawer at Cincinnati, a coal company doing business at Coalburgh, W. Va.; and that in the transaction of its business at Cincinnati, he then had, or expected to have, funds of the company in his hands applicable to the payment of the bill and on which it had been drawn. The relation of principal and agent may exist between drawer and drawee, without changing the rights of the payee against the drawee upon the acceptance of the bill. When the principal, located at one place, draws upon his agent located at another, the natural presumption is, from the usual course of business, that it is against funds of the principal that are, or will be, in the hands of the agent, and which the principal requests the agent to apply to the payment of the bill at its maturity. "A bill of exchange is presumed to be drawn on funds, with the understanding between drawer and drawee that it is an appropriation of the funds of the former in the hands of the latter, and acceptance is an admission that it was so drawn, and of such a relation between the parties." 1 Pars. N. & B. (2d ed.) 323.

The usual relation between the drawee and the drawer is that of debtor and creditor; and such relation in fact exists between an

Robinson v. Kanawha Valley Bank.

agent and his principal, where the latter has funds in the hands of his agent. The bill here, as drawn and accepted, is consistent with and supposes such relation; and as we have observed, there is nothing in the answer to the effect that such relation did not exist, nor was there any evidence offered to the contrary. Robinson was not bound to accept; or he might have done so on condition that he had funds of the principal at the maturity of the bill, and thus have qualified his obligation. But as it is, his acceptance imports the possession of funds, and obliges him to pay the bill. 1 Par. N. & B. (2d ed.) 301, and note (w).

The fact that he is designated in the bill and described in his acceptance as agent does not vary the case. This description of himself may, and no doubt did, serve a useful purpose in the settlement of his accounts with the company.

The law as to notes and bills, executed by persons acting as agents of other persons, is not uniform, but as a rule, where one acting as agent uses words that import a personal agreement on his part, and signs his own name, it is held to be his individual obligation, although he describe himself as agent; the added words being regarded simply as a description of his person. The rule is in conformity to precision in the use of language, and secures that certainty in negotiable paper so necessary to commercial transactions. *Thomas v. Bishop*, 2 Strange, 955; *Barker v. Mec. Fire Ins. Co.*, 3 Wend. 94; s. c., 20 Am. Dec. 664; Dan. Neg. Inst., § 300.

The question has been presented and so ruled in a number of the reported decisions of this court.

Thus in *Titus v. Kyle*, 10 Ohio St. 444, where the makers had described themselves in the body of the note as directors of a certain turnpike road, and the note read, "One year after date, we or either of us, as directors, etc., promise to pay," to which each signed his individual name, it was held that each was individually liable, and that in the absence of an averment of fraud or mistake, the makers could not be permitted to show an intention on their part not to bind themselves individually.

In *Collins v. Buckeye Fire Ins. Co.*, 17 Ohio St. 215, the note read, "I promise to pay, etc.," and was signed "Edward K. Collins, Agent." The defense was that the payee had notice of the agency of the maker, and that he was not liable individually upon the note. But the court held that parol evidence was inadmissible for that purpose, and that Collins was personally liable upon the

Robinson v. Kanawha Valley Bank.

note. These cases show that in this State, where one acting as agent signs his individual name to a note that by its language imports a personal liability on his part, he is bound accordingly although in signing the note he describes himself as agent.

We fail to see how it can make any difference in this respect whether the party signing describes himself as agent simply, or adds the name of his principal; in either case the principle upon which his liability is established and parol testimony excluded must be the same; the instrument upon its face is his own, and not the promise of his principal. To this rule usage has established an apparent exception, in the instances where a bill is drawn or accepted by the cashier of a bank. But it is rather apparent than real, since the custom by which a cashier represents his bank in such matters, by simply signing his own name, is so general that the practice has reduced the custom to the certainty of a law, as it is everywhere understood that in such cases, whether he describes himself as cashier or not, he is an *alter ego* of the bank. His signature is a recognized mode in which a bank may become a party to commercial paper; and the obligation so created is that of the bank and not of the cashier.

There is a marked distinction between this case and those in which the question just discussed usually arises. Ordinarily the principal is some third person, not otherwise related to the bill, but here it is claimed that he is the drawer, and if the acceptance be treated as his, and not that of Robinson, the paper loses its character of a bill of exchange and becomes a promissory note only, and the payee, instead of having a fund appropriated to the payment of his demand or secured by the obligation of an acceptor, is reduced to the personal obligation of the drawer only. This aspect of the case, as unfavorable to the defense, has been commented on, and does not require to be further enlarged.

The cases however to which we have adverted, show that a promissory note signed by an agent, in the manner this acceptance was made, becomes the individual liability of the agent, and would be decisive of this case, though the principal were a third party, unless an acceptance differs in principle from the making of a note, as does an indorsement. It seems that an indorsement may be explained by parol, as pointed out by WELSH, J., in *Collins v. Buckeye Fire Ins. Co.*, 17 Ohio St. 224. The indorsement being a mere transfer of title, the obligation arising outside of it may be changed

 Railway Company v. Spangle.

without affecting the indorsement itself. But the obligation of an acceptor is an express one; it is to pay the bill at its maturity according to the order contained in it. The language of the books is that the acceptor of a bill is as the maker of a note, and that when the drawer accepts he comes at once under an absolute obligation to pay the bill according to its tenor. 1 Para. Notes & Bills, § 2, chap. 4. No distinction between a promissory note and an acceptance exists in this regard, and so it has been held that the legal effect of an acceptance, as an absolute contract to pay, cannot be varied by parol. *Heaverin v. Donnell*, 7 S. & M. 244; s. c., 45 Am. Dec. 302; *Adams v. Wordley*, 1 M. & W. 374; *Hoare v. Graham*, 3 Camp. 57; 1 Para. Notes & Bills, 301; *Cummings v. Kent*, 44 Ohio St. 92.

Judgment affirmed.

FOLLETT, J., dissents.

 RAILWAY COMPANY V. SPANGLE.

(44 Ohio St. 471.)

Master and servant — agreement to waive liability for negligence.

An agreement by a railway brakeman, at the time of hiring, to waive his right to any action against the employer for negligence of the conductor is void as against public policy. (*See note, p. 836.*)

ACTION for personal injury by negligence. The head-note states the point. The plaintiff had judgment below.

C. H. Scribner, Ashley Paul and C. G. Getzendanner, for plaintiff in error.

Joshua R. Seney, for defendant in error.

OWEN, C. J. Is it competent for a railway company to stipulate with its brakemen, at the time, and as part of their contract of employment, that the company shall not be liable for the negligent acts of its conductors?

Western, etc., R. Co. v. Bishop, 50 Ga. 465, is cited, with other decisions of the same court approving and following it, in support of the affirmative of this proposition. In that case it was held that

Railway Company v. Spangle.

such a contract, so far as it does not waive any criminal neglect of the company, or its principal officers, is a legal contract and binding upon the employee. But McCAY, J., speaking for the court, says: "We do not say that the employer and employee may make any contract; we simply insist that they stand on the same footing as other people. No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers and doctors, of buyers and sellers, and bailors and bailees, as of employers and employees." This invites us to inquire whether and to what extent the contract we are dealing with is affected by considerations of public policy. It is maintained on behalf of the company that "a rule absolving the company from liability to the brakemen for negligence of the conductor, may operate to constitute the brakemen a sort of police; may induce them to be more watchful, and report to their superiors the delinquencies of the conductor. And if they are unwilling to do this, they, and not the company, should suffer the consequences. A rule of this kind is calculated, also, to better protect the public against injuries to merchandise in course of transportation, by promoting greater diligence and watchfulness on the part of the brakemen employed upon the trains."

Also that "a stipulation which would place additional responsibility upon the employee, and require for his own protection a close observance of the rules of the company, and a strict watch upon the conduct of his immediate superior, would tend to promote the safety of passengers and merchandise in transit."

If this view is tenable, it follows that public policy is concerned in and subserved by such a contract as is here sought to be enforced. As brakeman on the train, Spangler was subject to the orders and control of the conductor.

In *Little Miami Railroad Co. v. Stevens*, 20 Ohio, 415, it was first held, though by a divided court, that a railroad company is liable to an employee for an injury received through the negligence of another employee under whose control he is placed.

This principle was again considered in *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 202, and was applied by a unanimous court to a case like the one at bar, and the railroad company was held liable to a brakeman for an injury resulting to him from the carelessness of a conductor under whose control he had been placed by the company.

Railway Company v. Spangle.

In the course of an able and exhaustive opinion, RANNEY, J., says: "The servants employed to execute cannot recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others must be engaged, and they were jointly bound to perform what was jointly intrusted to them, and public policy may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and equally so, how the safety of travellers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness, that of the company that places him in power. * * * It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. * * * But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

A careful examination of this case and of *Little Miami R. Co. v. Stevens, supra*, which it approves and follows, will make it apparent that the liability of railroad companies for injuries to their servants caused by the carelessness of those who are superior in authority and control over them, is placed chiefly upon considerations of public policy.

The doctrine established by these cases has remained unquestioned by this court for more than thirty years. It furnishes a conclusive answer to the contention of the company that the stipulation which it seeks to enforce would better protect the public by promoting greater diligence on the part of brakemen and the consequent safety of passengers and merchandise in transit.

We are thus relieved of all discussion of the relation which the liability of railroad companies for injuries to their servants caused by the negligence of their superiors in authority sustains to the policy of the State. It is the firmly established policy of our law that

Railway Company v. Spangle.

such liability should attach. It follows that even *Western, etc., R. Co. v. Bishop, supra*, which is the strongest authority cited by the company in support of its position, fails to support the view contended for. As we have seen, that case expressly declares that contracts contravening public policy will not be enforced. The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employees, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employees simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements. The trial court was right in refusing the instruction requested.

Judgment affirmed.

NOTE BY THE REPORTER.—To the same effect, *Roesner v. Hermann*, 10 Blm. 486; 8 Fed. Rep. 782, where the question was passed upon orally, without consideration; and see *Kans. Pac. Ry. Co. v. Peavey*, 29 Kans. 169; s. c., 44 Am. Rep. 630.

To the contrary is *Griffiths v. Earl Dudley*, 9 Q. B. Div. 357, under the Employers Liability Act; s. c., 44 Am. Rep. 683, note.

In *Western, etc., R. Co. v. Bishop*, 50 Ga. 465, the court said: "Labor is property, and the laborer has, and ought to have, the same right to contract in reference to it as other persons have in reference to their property. Generally the duties cast by law upon employer and employee are only implications of law; in the absence of stipulations by the parties, it would be a dangerous interference with private rights to undertake to fix by law the terms upon which employer and employee shall contract. For myself, I do not hesitate to say that I know of no right more precious, and which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same law-giver which claims to make a contract for them on one point, may claim to do so upon others, and thus step by step they cease to be free men. We do not say that employer and employee may make any contract; we simply insist that they stand on the same footing as other people. Will it for a moment be insisted that one who borrows a horse may not stipulate that he shall exercise only the care cast by law upon one who hires a horse? May not a warehouseman stipulate that he will take extraordinary care, when the law, in the absence of such a stipulation, would cast upon him only ordinary care? May he not even stipulate that all the risk shall be upon the bailor?" In this

 Railway Company v. Spangle.

case however it was held that the employee might not waive liability for criminal neglect.

In *Little Rock & Ft. S. R. Co. v. Bubanks*, Arkansas Supreme Court, March 12, 1887, it was held that an agreement entered into by one with a railroad company upon being employed as brakeman, to take upon himself all risks incident to his position on the road, and not to hold the railroad company liable for any injury he may sustain by accident or collision on the trains of the road, or by defective machinery, or carelessness, or misconduct of himself or any other employee of the company, is not binding on him. The court said: "In 1880 the English parliament passed the 'employers' liability act,' the object of which was to make employers liable for injuries to workmen caused by the negligence of those having the supervision and control of them. In *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 337, it was held that a workman might contract himself and his representatives out of the benefits of this act. An opposite conclusion has been reached by the Supreme Courts of Ohio and Kansas. They hold that it is not competent for a railroad company to stipulate with its employees at the time of hiring them and as part of the contract, that it shall not be liable for injuries caused by the carelessness of other employees. *Lake Shore & M. S. R. Co. v. Spangle*, 44 Ohio St. 471; *Kansas Pac. R. Co. v. Peavey*, 29 Kans. 169; s. c., 44 Am. Rep. 630; s. c., 11 Am. & Eng. R. Cas. 200. In the notes to the last-mentioned case, as reported in the two series of reports last cited, the substance of *Griffiths v. Earl of Dudley* is set out. This however is not precisely the same question we have to deal with, for the negligence of a fellow-servant is not in fact and in morals the negligence of the master, although by virtue of a statute it may be imputed to the master. It is impossible for the master always to be present and control the actions of his servants. Hence a stipulation not to be answerable for their negligence beyond the selection of competent servants in the first instance, and the discharge of such as prove to be reckless or incompetent, might be upheld as reasonable, notwithstanding a statute might abolish the old rule of non-liability for the acts and omissions of a co-servant. But the Supreme Court of Georgia have in several cases sustained contracts like the one before us as legal and binding upon the employee, so far as it does not waive any criminal neglect of the employer. The effect of these decisions is that the servant of the railroad company, for instance, not only takes upon himself the incidental risks of the service, but he may by previous contract release the company from its duty to furnish him a safe track, safe cars, machinery and materials, and suitable tools to work with. *Western & A. R. Co. v. Bishop*, 50 Ga. 485; *Western & A. R. Co. v. Strong*, 52 Ga. 401; *Galloway v. Western & A. P. R. Co.*, 57 Ga. 512. On the other hand, in *Roesner v. Hermann*, 10 Biss. 486; 8 Fed. Rep. 782, a contract by a master against his own negligence was declared to be void as against public policy, GRESHAM, J., saying: 'If there was no negligence the defendant needed no contract to exempt him from liability; if he was negligent the contract set out in his answer will be of no avail.' Compare *Memphis & C. R. Co. v. Jones*, 2 Head, 517, where it was decided that such a contract would not protect the master against gross negligence. It is an elementary principle in the law of contracts that '*modus et conventio vincunt*

Railway Company v. Spangle.

legum — the form of agreement and the convention of parties override the law. But the maxim is not of universal application. Parties are permitted by contract to make a law for themselves only in cases where their agreements do not violate the express provisions of any law, nor injuriously affect the interests of the public. Broom Leg. Max. *543; *Kneelle v. Newcomb*, 23 N. Y. 249. Our Constitution and laws provide that all railroads operated in this State shall be responsible for all damages to persons and property done by the running of trains. Const. 1874, art. 17, § 12; Mansf. Dig., § 5537. This means that they shall be responsible only in cases where they have been guilty of some negligence; and it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy. The law requires the master to furnish his servant with a reasonably safe place to work in, and with sound and suitable tools and appliances to do his work. If he can supply an unsafe machine or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutary rule. In the English case above cited it is said this is not against public policy, because it does not affect all society, but only the interest of the employed. But surely the State has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community; and it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railroad company, and every owner of a factory, mill or mine, would make it a condition precedent to the employment of labor that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous even when well managed; and the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity."

Mr. Greenwood (Pub. Pol. 528), adopts the rule of *Roesner v. Hermann*, *supra*. He notices the *Bishop* case but not the *Griffiths* case. But we think the doctrine of the principle case unsupportable in principle and opposed to the best authority. We agree with the *Solicitors' Journal*, which pronounces the decision in *Griffiths v. Earl Dudley*, "quite unquestionable." As FIELD, J., suggests in that case, such a contract is not subject to any considerations of public policy; it does not concern the public. What have the public to do with the negligence of a railroad conductor which affects only a brakeman? In most of the States there would be no need of such a contract, because the railroad company would not in any event be liable for the neglect of the conductor toward the brakeman.

Castle v. Rickly.

CASTLE V. RICKLY.

(44 Ohio St. 490.)

Negotiable instrument — indorser after negotiation.

A stranger to a note, who indorses it after its inception, to give the payee credit with a proposed purchaser, is liable as a guarantor, without protest and notice.

ACTION on promissory notes. The opinion states the case. The plaintiff had judgment below.

J. T. Holmes, for plaintiff in error.

E. L. De Witt, for defendants in error.

DICKMAN, J. On the 18th day of November, 1872, George W. Griffith, for value received, made his two promissory notes of that date, for \$156, each, to Jacob Matheny or order, payable respectively in three and four years after date, with interest from date, payable annually. Both notes bore the indorsement: "Protest waived. J. S. Matheny, G. F. Castle." Matheny and Castle, the plaintiff in error, purchased a house and lot in Columbus, Ohio, of Samuel S. Rickly, one of the defendants in error, and these notes were transferred to him as part of the purchase-money. Upon non-payment of the notes by the maker at maturity, an action was brought by Rickly on each note against Griffith, Matheny and Castle, in the Court of Common Pleas for Franklin county, but the two cases were consolidated, and Griffith and Matheny being in default for demurrer or answer, the case as consolidated was tried on the issues made by an amended petition and the answer of Castle thereto. The notes were taken by Rickly several days after they were executed and delivered to the payee, to-wit. about December 10, 1872. Although the payee had indorsed them, Rickly, before taking them, required for additional security, that Castle should also put his name on the back thereof. Castle accordingly, and before the notes had matured, signed his name thereon under that of the payee; the notes were then delivered to Rickly, and the real estate transaction was consummated. On the trial in the Common Pleas, evidence was offered by the defendant tending to show that the words "protest waived" were put on the

Castle v. Rickly.

notes by Matheny, some considerable time after their delivery to Rickly as part payment for the real estate, and that Castle had no knowledge thereof until after the original action was brought.

Among other things, the court charged the jury as follows:

1st. "The instruments sued on in this action are not foreign notes, but are inland notes, * * * but it was necessary, at maturity, to demand payment of the maker, and on his failure to promptly pay the same, to give immediate notice of such demand and dishonor to the indorsers, unless demand and notice of such non-payment had been waived."

2d. "But whether he" (the defendant Castle) "was indorser or guarantor, the nature of his undertaking was such that he was entitled to have notice of demand and non-payment of said notes; the same as if he was a mere indorser; and if no such notice was given to him, the plaintiff cannot recover, unless you should find, from the evidence, that the words 'protest waived' were on said notes at the time the said Castle indorsed them, or that they were subsequently placed there by his authority."

But the court refused to give the following charge to the jury, as requested by the plaintiff, to-wit:

"If you should find, from the evidence, that the said Castle did not indorse said notes, by writing his name on the back thereof, under the words 'protest waived,' or at the same time, and as part of the same transaction, he did not write, or there was not written over his name the words 'protest waived;' yet if you should find, from the evidence, that the said Castle indorsed said notes, by writing his name upon the back thereof, in blank, after the execution of said notes, and that the said Castle was not an original party to the notes, but a stranger, this would constitute an absolute and unconditioned guaranty of said notes by the said Castle; and the said Castle, having made no defense to said guaranty, he would be liable, as guarantor of said notes, without notice to him of demand and non-payment, or protest, and your verdict must then be for the plaintiff, finding the amount due the plaintiff from said defendant, Castle, on said notes."

To which charge and refusal to charge, the plaintiff at the time excepted. A verdict was returned in favor of Castle. A motion for a new trial being overruled, judgment was entered on the verdict, and a bill of exceptions, embodying all the evidence adduced on the trial, was allowed and made part of the record. The Dis-

Castle v. Rickly.

strict Court reversed the judgment of the Common Pleas, for error in its charge, and refusal to charge the jury as requested, and remanded the cause for a new trial. This proceeding is instituted to reverse the judgment of the District Court.

It is not claimed that the plaintiff in error ever had notice of any demand of payment on the maker of the paper in question and of its dishonor. The jury was doubtless satisfied that Castle had not expressly waived demand and notice; that he had not adopted the words of waiver put on the note by Matheny. From the charge of the court and its refusal to charge as requested, the jury could not but find that Castle had the rights of an indorser, and was entitled to have notice of demand and non-payment of the notes, and that the plaintiff upon his failure to give such notice could not recover. The question therefore arises, whether Castle is to be regarded as an indorser of negotiable paper, with the liabilities and rights incident to such an engagement, or a guarantor, whose guaranty was of such nature as to render it unnecessary to prove either demand or notice in order to make out a *prima facie* case for recovery.

We are of opinion that the plaintiff in error was such a guarantor. It was held in *Champion v. Griffith*, 13 Ohio, 228, and afterward approved in *Robinson v. Abell*, 17 Ohio, 36, that the mere indorsement upon a note of a stranger's name in blank is *prima facie* evidence of guaranty, there being no proof that his indorsement was made at the time of the making of the note. This presumption, it is true, may be overcome by parol evidence that a different agreement was intended. *Oldham v. Brown*, 28 Ohio St. 52; *Kelley v. Few*, 18 Ohio, 441; *Bright v. Carpenter*, 9 Ohio, 139; s. c., 34 Am. Dec. 432; *Champion v. Griffith*, *supra*; *Robinson v. Abell*, *supra*. But the evidence, as disclosed by the record, shows that Castle's name was not put upon the notes at the time of their execution or before they were drawn, and so he could not be charged as an original promisor. He was a stranger to the paper, his name not being thereon at the time it was first offered to Rickly in part payment for the real estate. Not then being in the chain of title, leaving no ownership in the notes, he could not, in the capacity of indorser, vest title thereto in an indorsee. Matheny, the payee, was at the time in possession of and the sole owner of the notes, and was the only person competent as an indorser to enter into the contract implied in the act of indorsement, namely, that he had a good title

to the instruments. As an indorser, he did not transfer the paper to Castle, who might in turn indorse it to pass title, but Matheny by indorsement vested title directly in Rickly, with no indorsee intervening. Rickly however demanded other security than a recourse to those who were parties to the paper, and therefore required that Castle, a stranger to the paper, should place his name upon its back, and thus add strength and credit to it, and render it more easy of circulation. Castle, in signing his name under that of the payee and indorser, assumed the obligation of a guarantor, and did not contract to pay the notes if dishonored, only upon condition that they would be duly presented for payment at maturity, and due notice would be given to him of the dishonor. The rule as laid down by Judge STORY is that if subsequently to the time when the note is made a party indorses it, not being a regular indorsee from or under any of the antecedent parties, he will be deemed a guarantor, if there be a sufficient consideration. Story Prom. Notes, § 133.

The guaranty of the plaintiff in error was not dependent on any condition or contingency expressed in or implied from the terms of his contract. In legal effect, it was as absolute and unconditional as if he had written on the back of each note, "I guarantee the payment of the within note"—words held in *Clay v. Edgerton*, 19 Ohio St. 549, to be an absolute and unconditional guaranty and which rendered is unnecessary to aver or prove either demand or notice, in order to make out a *prima facie* case for recovery. As said in *Neil v. Trustees, etc.*, 31 Ohio St. 15, "a breach of the agreement of the guarantor results from the nonpayment of the debt." There being no condition, as regards presentment or notice, implied in the terms of such a guaranty, the guarantor must inquire of his principal, or take notice of his default, at his peril. By such a guaranty, the guarantor is not made a party to the note, and his contract, unlike that of an indorser, is governed by the rules of the common law, and not by those peculiar to the law merchant. "It is an undertaking to do a certain thing in a certain specific event. The event is a default in the payment of the bill or note by the parties. When this happens, the liability of the guarantor, by the terms of his guaranty, is complete." Story Prom. Notes (7th ed.), 623, note by Thorndike. In accordance with the foregoing considerations, we are of opinion that the judgment of the District Court should be affirmed.

Judgment accordingly.

CHASE V. CITY OF CLEVELAND

(44 Ohio St. 504.)

Municipal corporation — icy sidewalk

A city is not liable for an injury sustained by a traveller by a fall upon a level sidewalk by reason of smooth ice, it not appearing that it was at a greatly frequented place.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

Mix, Noble & White, for plaintiff in error.

Allen T. Brinsmade, for defendant in error.

SPEAR, J. It will be noticed that there is no allegation in this petition that the walk was itself defective. No improper construction is charged, nor is it alleged that the walk was in such condition as to be peculiarly liable to cause the formation of ice; nor was the ice rough or uneven. The place where the accident occurred does not even appear to have been upon a slope or incline. So far as the charge of negligence on the part of the defendant is concerned the gravamen of the complaint is: 1. The defendant is a city of the first class; 2. Wood street is a street within the corporate limits; 3. For a number of days next preceding the accident the city had carelessly and negligently suffered ice and frozen snow to accumulate on the sidewalk in front of the property of a private owner, so as to become dangerous for persons passing along the same, having been beaten smooth and slippery, so that children had made a slide there, which had been there for some days previous, of all which defendant had or might have informed itself in time to have made the walk safe before the occurrence. Putting this charge in fewer words, it appears that the defendant is a city of the first class. Wood street is one of the public highways. On a sidewalk of this street, in front of private property, the city suffered ice and frozen snow to accumulate, and for a number of days to be beaten smooth and slippery, and for that reason to become and remain dangerous.

* Same effect, *Grossenbach v. City of Milwaukee* (65 Wis. 81), 56 Am. Rep. 614.

Chase v. City of Cleveland.

Of this condition of the walk the city might have informed itself in time enough to have made it safe before the accident.

Is this a sufficient charge of negligence? To show negligence it must be made to appear (1) that the city had notice, actual or constructive, of the dangerous condition of the walk in time to remedy it, and (2) that having such notice, it was the city's duty to remedy it.

As to the first: For all that appears Wood street may be a street lying on the outer limits of the corporation. It may be a street but little improved, but little used, and but little frequented by the general public.

If therefore as to every part of every public highway within the municipality it was the duty of the city to take unusual means and use extraordinary care to keep itself advised of the condition of the walks, then such duty attached to this part of Wood street; otherwise not. We say extraordinary care, because the allegation that the city "had or might have informed itself," etc., means only that it might have informed itself, which is another form of saying that it was possible to have obtained the information.

The terms "a number of days" and "some days" may mean two days or more. Neither necessarily indicates a greater number than two. Now as to the most public and frequented streets, it may be that the allegation that the accumulations were there a number of days, or some days, is sufficient to cause notice to the city to be presumed, but this would not necessarily be so as to out-of-the-way streets and those remote from business centers. It would be improbable that any city official who owed any duty in that regard would pass in the time stated under such circumstances as to make it incumbent on him to observe the condition of the walk, or that the proper city authorities would be informed of its condition from other sources. The allegations referred to are therefore clearly insufficient to show notice to the city. So that the plaintiff is remitted, as to this essential element, to the allegation that it was possible for the city to have obtained the information. We do not understand that a city is bound at all hazards to have knowledge of defects in sidewalks. Municipal corporations are not insurers of the safety of their public ways, or of the lives and limbs of pedestrians. The law provides that such corporations shall have the care, supervision, and control of the streets, and shall cause

Chase v. City of Cleveland.

them to be kept open and in repair, and free from nuisance. This requires a reasonable vigilance, in view of all the surroundings, and does not exact that which is impracticable. When the authorities have done that which is reasonable in this regard they have discharged the entire obligation imposed by the law. They are not bound to use all possible vigilance in inspection or in obtaining information.

This view, if correct, disposes of the case; but, waiving this, is the petition free from infirmity in other respects? The city is bound to exercise due care to keep the streets and walks reasonably and relatively safe, but cannot be required to make all streets and walks absolutely safe or equally so. The complaint is that the walk was dangerous by reason of accumulations of ice and frozen snow, which rendered it slippery. The result was due in part to the elements and in part to the beating down of the ice and snow, especially by children sliding on it. If then the city of Cleveland, as to all the sidewalks within the corporate limits, is liable for accidents which occur by reason of slippery sidewalks, of the condition of which it has notice, then were notice shown here it would be liable to the plaintiff in this case. It is insisted that there is such liability. If this be the law, an onerous burden is cast upon many of our municipal corporations. In all northern cities and towns storms of snow and sleet, producing ice and resulting in slippery walks, are of frequent and constant recurrence during the winter season, and accidents of the character complained of are also frequent. Such dangers are apt to exist in many places at the same time, and at points widely separated from one another. They appear at many points to-day, disappear to-morrow, and like dangers appear at other places the next day. They are effected by changes of weather, which are likely to occur at any time, and frequently many times within a few hours. It is not unreasonable to assume that there were hundreds of similar dangerous places in the city of Cleveland at the time of the accident to plaintiff. To effectually provide against dangers from this source would require a large special force involving enormous expense; for to make the protection effective, constant activity and vigilance would be required as well in the ascertainment of the dangers as in their removal upon being known.

Such duties do not naturally fall within the province of the police force, as that force is not a city agency for any such purpose. It

would be possible to employ and pay a special force, but it does not follow that it would be reasonable to require it.

Regarding the removal of dangers as well as regarding watchfulness in ascertaining their existence, the municipality is bound to exercise only ordinary care; to take such measures as are reasonably to be required and adequate in view of the ordinary exigencies.

The condition of the walk in this case is not complained of as a defect in the sidewalk, but rather an accumulation on it which created a nuisance. This was transient in its character, and not such as to ordinarily require the interference of the city authorities for its abatement. Those authorities are empowered to clear the streets from snow and filth, and by ordinance, to require property-owners to keep the walks cleared from snow and ice, but ordinarily liability does not attach for a failure to do so. Slipperiness may arise from a variety of causes. A thin film of mud on the walk will often produce it, and yet liability would hardly be claimed to arise from such cause. It is not clear, on principle, that an exception should necessarily be made in regard to slipperiness from accumulations of ice.

We have considered the numerous authorities referred to by counsel in the able and elaborate printed brief, and have read the argument with much pleasure. It invites to an extended discussion of the subject and a review of the authorities. We doubt whether good would result from extended discussion, or from an attempt to weigh the arguments in the conflicting decisions of other States, or even from a lengthy review of those decisions, and hence do not enter upon either, but are content to rest this branch of the case as to the duty of the city regarding removal of ice from the sidewalks within the municipality, on the ground tersely put in substance by counsel for defendant, that the law exacts of municipalities only that which is practicable and reasonable in regard to keeping streets open, in repair, and free from nuisance; that the duty of the municipality, under the statute, must be interpreted upon a reasonable basis in reference to the actual condition of affairs; that impracticable things are not required, and that to hold the city liable, under the allegations of this petition, would be to require that which is impracticable, and to impose an onerous and unreasonable burden upon it.

Whether or not a case might be made, growing out of a peculiar

Chase v. City of Cleveland.

situation of a walk at a greatly frequented place upon one of the most public streets wherein the city might be held for damages arising from slipperiness of ice alone, we need not here consider. Such a case has not been made.

The petition does not state a cause of action, and the judgment of the Court of Common Pleas is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

ANNAS V. MILWAUKEE AND NORTHERN RAILROAD COMPANY.

(67 Wis. 46.)

Carrier — railroad — free pass — limitation of liability.

SUFFICIENTLY reported, 57 Am. Rep. 388.

BURSINGER V. BANK OF WATERTOWN.

(67 Wis. 75.)

Insurance — life — assignment — interest.

A policy on one's own life, the premiums having been fully or nearly paid up, may be effectually assigned by him to any person having no insurable interest in his life. (*See note, p. 852.*)

An assignment by a son of an insurance policy on his own life as security for a debt from his father to the assignee is valid.*

ACTION on a life insurance policy. The head-note states the points. The defendant had judgment below.

George W. Bird, for appellant.

*See *Elkhart Mut. Aid, etc., Assn. v. Houghton* (108 Ind. 286), 53 Am. Rep. 514

 Bussinger v. Bank of Watertown.

Harlow Pease, for respondent.

TAYLOR, J. [Omitting other points.] But the learned counsel for the appellant contends that the assignments in this case are void at law, because assigned to a party who had no insurable interest in his life, and therefore independent of the question of his incapacity to make the assignments on account of his drunkenness, he is entitled to recover upon that ground. As there must be a new trial in the case where this point may be pressed upon the Circuit Court, and the point having been fully argued on this appeal, we feel called upon to give our opinion upon that question.

We think this question has been decided against the appellant by this court in the following cases cited by the respondent: *Archibald v. Mut. Life Ins. Co.*, 38 Wis. 542; *Clark v. Durand*, 12 Wis. 223; *Kernan v. Howard*, 23 Wis. 108; *Foster v. Gile*, 50 Wis. 603. There being no question but that the policy was originally obtained for the benefit of a person having an insurable interest in the life of the assured, the policy being upon the life of the assured himself, that the owner of such policy may thereafter lawfully assign the same to any person, with the assent of the insurance company, is sustained by the great weight of authority, and as we think by sound principles of law. See the following authorities: *St. John v. Am. Mut. L. Ins. Co.*, 13 N. Y. 31; *Valton v. Nat. F. L. Ass. Co.*, 20 N. Y. 32; *Olmsted v. Keyes*, 85 N. Y. 593; *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 294, 302; *Fairchild v. N. E. Mut. L. Ass'n*, 51 Vt. 625; *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496; *Ashley v. Ashley*, 3 Sim. 149; *Mut. L. Ins. Co. v. Allen*, 138 Mass. 24; *Harrison v. McConkey*, 1 Md. Ch. 34; *Angell Fire Ins.*, § 325; *Langdon v. Union Mut. L. Ins. Co.*, 22 Am. Law Reg. 385; *Campbell v. N. E. Mut. L. Ins. Co.*, 98 Mass. 381; *Palmer v. Merrill*, 6 Cush. 282; s. c., 52 Am. Dec. 782.

The only case cited by the learned counsel for the appellant which really holds a different doctrine is *Mo. Valley Ins. Co. v. Sturges*, 18 Kans. 93; s. c., 26 Am. Rep. 761. The case of *Franklin Mut. Ins. Co. v. Hazzard*, 41 Ind. 116; s. c., 13 Am. Rep. 313, was a case where the assured, after paying two annual premiums, announced to the company that he should not keep up the policy, and he declined to pay a premium then past due. Shortly afterward he assigned the policy to Hazzard for the sum of \$20. The premium paid by the assured was \$62.40. The court say: "The

question arises whether a person can purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no insurable interest." It might well be said that the purchase of the policy in this case, after the holder determined not to continue it, was equivalent to taking out an original policy on the life of the assured.

All the cases cited by the learned counsel in the courts of the United States were cases where it was evident the original policies were taken out for the benefit of the persons to whom they were immediately assigned, and who in fact paid the premiums on the policy from the beginning. Taking out the policies in the names of the assignors in those cases was clearly a cover for acquiring a wager policy on the life of a person in whom the person really insured had no insurable interest. The language of the learned justice of the Supreme Court of the United States who wrote the opinion in the case of *Warnock v. Davis*, 104 U. S. 775, when considered in the light of the facts of the case, does not conflict with the rule laid down by this court and the courts above mentioned.

Whatever objection there might be to allowing the assignment of a life policy, upon which the future premiums are to be paid, during the life of the assured, no such objection can be fairly raised against the assignment of a policy upon which all the premiums have been paid, and the payment of the amount due is alone dependent on the death of the assured, nor to the assignment of an endowment policy where nearly all the payments have been made.

It is not an established rule of law that every contract is void which gives the party to it a pecuniary interest in the death of the other party or of a third person. If that were the law, then every conveyance, will or other instrument, which conveyed to another an estate in reversion, would be void, as the reversioneer is certainly interested in the speedy demise of the person owning the life estate. There would seem to be no greater reason for holding void a sale or assignment of a life insurance policy which has been obtained in good faith by the holder, to a third person, with an agreement on his part to pay the future premiums and receive the insurance money on the death of the assured, than there would be for holding that a person who held a life estate in real property could not lease such estate for the term of his life to the reversioners, upon the payment of a stipulated annual rent to be paid to

the party having the life estate. In that case, the party taking the life lease would have just as much interest in the speedy death of the holder of the life estate as the purchaser of an insurance policy upon which annual premiums are to become due has in the death of the assured.

The mere fact that a person who becomes the purchaser of a life policy may thereby become interested in the speedy death of the person to whom the policy is issued, can be no legal ground for holding such purchase void. In all the decided cases where such assignments have been held void, there has also existed the fact that the assignee or purchaser has taken the policy, not in good faith, paying the value thereof, but as a speculation upon the life of the party in whom he has no interest, and so the transaction has been brought within the rule against wagering policies. Nor are we able to perceive why the holder of a valid policy should be prevented from realizing the value of the same to him, before his death, by a *bona fide* sale or assignment thereof. Such sale or assignment may, in fact, be absolutely necessary in order to get any benefit of his policy. The holder may have paid thousands of dollars in premiums, through a long series of years, and a time may come when he becomes unable to pay the premiums to become due, and he must either sell his interest in the policy, or suffer it to lapse and lose all the premiums paid. Under such circumstances, can there be any thing against public policy or the law which will prevent the unfortunate holder of the policy from selling the same for the best price he can, and so get some benefit of his previous payments? We think not. The only reason for holding such sale void is because it gives the purchaser a pecuniary interest in his speedy death, and as we have seen above, that fact alone has never been held sufficient to render a contract void. So far from this fact being a cause for holding the contract void, the law of this State expressly sanctions the issuing of wager policies for the benefit of a married woman, and thus, in all such cases, gives a pecuniary interest in the speedy death of the person so insured for her benefit. See § 2347, R. S. 1878.

But there is another ground upon which the assignment of the policies in this case can, we think, be upheld in case the plaintiff was at the time competent to make them, viz., the person for whose benefit in part they were made had an insurable interest in the life of the plaintiff. The evidence shows that the assignments

Buminger v. Bank of Watertown.

were made as security for a debt due from the father of the assured to the bank, and so was for the benefit of the father as well as of the bank. That the son has an insurable interest in his father, and the father in the son, would seem to be supported by the authorities. See *Aetna L. Ins. Co. v. France*, 94 U. S. 561; *Loomis v. Eagle H. & L. Ins. Co.*, 6 Gray, 399; *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249; *Reserve Mut. Ins. Co. v. Kane*, 81 Penn. St. 154; *Warnock v. Davis*, 104 U. S. 775; May on Ins., § 107, p. 113, and cases cited; *Williams v. Wash. L. Ins. Co.*, 31 Iowa, 541; *Mitchell v. Union L. Ins. Co.*, 45 Me. 104; *Hoyt v. N. Y. Life Ins. Co.*, 3 Bosw. 440.

It is held in the case of *Aetna L. Ins. Co. v. France*, *supra*, that the relationship of the parties divests the policy of those dangerous tendencies which render those policies contrary to good morals; and in the Pennsylvania case it was held that a statutory provision requiring the father to support the son, and the son the father, in case either required the support of the other, was a sufficient interest to support a life policy.

For the reason that the record discloses the fact that the plaintiff produced evidence on the trial tending to show that he was incompetent, on account of intoxication, to make the assignments in question at the time they were made, it was error for the Circuit Court to nonsuit the plaintiff, and for that error the judgment must be reversed.

By the Court. The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—See *contra*, *Helmslag's Adm'r v. Miller*, 76 Ala. 183; s. c., 52 Am. Rep. 316; see note, 52 Am. Rep. 135.

In *Bloomington Mut. Life Ben. Ass'n v. Blue*, Illinois Supreme Court, March 23, 1887, it was held that a person may, of his own accord, insure his own life, pay the premiums himself, and make the policy payable upon his death to a third party who has no insurable interest in his life. The court said: "It may be regarded as a plain proposition of law that a wagering policy is void, and we think it also well settled that a policy taken out on the life of a third party by a beneficiary, in the continuance of whose life the beneficiary has no pecuniary interest, may be regarded as a wagering policy, and as such would be void. Had this policy been taken out by Blue on the life of Bailey, without his knowledge or consent, and had the premiums been paid by him it would manifestly fall within what is known as a wagering policy, and would be void. Public policy forbids one person, who has no interest in the continuance of the

Bursinger v. Bank of Watertown.

life of another, from speculating on that life by procuring a policy of insurance. But here it does not appear that Blue had any instrumentality whatever in procuring the policy on the life of Bailey, or that he ever paid any portion of the premiums to procure the policy, or to keep it in force, and hence the case of *Ins. Co. v. Hogan*, 80 Ill. 39, cited by the defendant, has no bearing on this case. In the case cited the insurance was procured by the beneficiary, and all the premiums were paid by him; while here Bailey procured the policy, and paid all the premiums. Manifestly the *Hogan* case can have no bearing on the facts of this case. Bailey had an insurable interest in his own life; and had a clear right to procure a policy on his life; and unless some principle of public policy is violated, he could make it payable in case of death, to any person whom he might desire. In *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 294, where a similar question arose, it is said: 'A question was made before us that Miss Lemon had not an insurable interest in Mr. Peterson's life.' If she had undertaken to obtain, and had herself obtained an insurance on his life, that question might have arisen; but surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it, and we know of no law to prevent him making it payable, in case of his death, to the person to whom he was affianced; and if such a policy is delivered as a gift to the party to whom payable, we know of no law to prevent such a gift from being effectual. In *Rauke v. Life Ins. Co.*, 27 N. Y. 282, Judge WRIGHT says: 'If the contract is with the party whose life is insured he may have the loss payable to his own representative, or to his assignee or appointee.' In *Fairchild v. North-eastern M. L. Ass'n*, 51 Vt. 618, it is said: 'The second point made by defendant is that Fairchild had no insurable interest in the life of Mrs. Nay, and that the policy is therefore a wagering contract, and void by the law of the State. * * * If it were shown therefore that in point of fact Fairchild procured this policy to be issued upon the life of Mrs. Nay himself, and for his own benefit, the question of his insurable interest might arise. But the *prima facie* showing of the policy, application and receipts, is that Mrs. Nay procured the policy to be issued herself upon her own life, and chose to make Fairchild the beneficiary. * * * We are bound to presume that the policy was procured by Mrs. Nay upon her own life, as is the purpose of the instrument itself. * * * 'It cannot be questioned,' says the Supreme Court of Indiana, 'that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money, in case of his death, during the existence of the policy; and he may effectuate this object by an assignment of the policy, or by immediately appointing such person as the beneficiary. * * * It is the interest of A. in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by the agreement of the parties to receive the proceeds of policy upon the death of the assured.' In *Langdon v. Un. M. L. Ins. Co.*, 14 Fed. Rep. 272, it is said: 'There is no case to my knowledge which holds that a party may not insure his own life, and make the policy payable to any one he may select, though such person has no legal interest in his life. * * * Although this exact question has not been decided, the intimations of the courts are uni-

Bursinger v. Bank of Watertown.

formly in that direction.' In *Connecticut M. L. Ins. Co. v. Schaffer*, 94 U. S. 457, it is said: 'There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend, or two or more persons on their joint lives for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question. The essential thing is that the policy should be obtained in good faith, and not for the purpose of speculating on the hazard of a life in which the assured has no interest.' There are other authorities holding the same doctrine, but we have referred to enough to show the current of authority on the question.' The first section of the act under which the defendant is organized, in express terms authorizes the organization of such associations for the purpose of furnishing life indemnity or pecuniary benefits to devisees or legatees. If as is plain from the language of the statute, a person may take out a policy on his own life, and devise such policy to a stranger, what principle of public policy would be violated by a provision in the policy making it payable to a stranger, in lieu of doing the same thing by will? If the policy may be made payable to a stranger, who has no insurable interest in the life of the insured, as it may be by statute, we perceive no reason which will prevent the same thing being done by a clause the insured may have inserted in the policy at the time the insurance is procured. We have been cited to *Mutual Ben. Ass'n v. Hoyt*, 46 Mich. 473, as an authority holding that the policy is contrary to public policy and void. The case cited sustains that view, but we do not regard it in harmony with the current of authority; and are not inclined to follow it. We think the better rule is, where a person obtains a policy on his life of his own accord, and pays the premium himself, he may if he desires make the policy payable to one who has no insurable interest in his life, and by so doing no rule of law or principle of public policy will be violated."

A person who has no insurable interest in another's life cannot recover upon an insurance policy on such life, which is purchased during the life-time of the insured, and the sale and transfer of a policy of insurance by the beneficiaries during the life of the insured, to one who has no insurable interest in the life of the insured, is a fraud upon the insurance company by which it was issued. *Frank v. Mutual Life Ins. Co.*, 108 N. Y. 266, is referred to as an authority that the beneficiaries can maintain an action upon the policy notwithstanding the assignment to Mrs. Parker. The courts of New York hold that a valid policy of insurance, effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the insured, to the full sum payable, without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the insured. *St. John v. Ins. Co.*, 13 N. Y. 31; *Valton v. Assurance Co.*, 20 N. Y. 32. This court refused to follow the decisions of New York in *Insurance Co. v. Sturges*. The decision in *Frank v. Ins. Co.*, *supra*, was rendered under a statute making a policy procured on the husband's life for the benefit of the wife unassignable. The validity of an assignment of a policy to one having no insurable interest in the life of the insured did not enter into the case. There was a want of power to assign. Therefore that case has no affinity with the one under consideration. Supreme Court of Kan.

Bursinger v. Bank of Watertown.

sas, January 7, 1887. *Missouri Valley Life Ins. Co. v. McCrumb*. Opinion by HORTON, C. J.

Murphy v. Red, Mississippi Supreme Court, April 11, 1887, is in harmony with the principal case. The court said: "It is shown that the husband of appellee, before his death, assigned the policy on his life for a valuable consideration, to appellant's intestate. It is not suggested that there was any purpose in procuring the policy to evade or circumvent the laws against wager policies; but it is affirmed on the one side, and denied on the other, that the fact that the assignee had no insurable interest in the life insured vitiated the assignment, and the case will be considered in that aspect. It is generally agreed that mere wager policies (that is to say, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction) are void as against public policy. *Mutual Ins. Co. v. Schaefer*, 94 U. S. 457. And it must be admitted that there are decisions and *dicta* to the effect that it is unlawful for the holder of a life insurance policy on his own life to sell or assign the same, under any circumstances, to one who has no insurable interest in the life insured. Courts which deny the validity of such sale or assignment, manifest great sensibility in regard to the danger which such transaction, if sanctioned, would cause to human life. They say that all the objections against issuing a policy directly to one on the life of another in whose life the former has no insurable interest, exist against his holding such policy by mere purchase and assignment from another; that in either case, the holder of such policy is interested in the death, rather than in the life, of the insured; and that the speculative or gambling element is the same, and the temptation to shorten the life of the insured is the same in the one case as in the other.

"The weight of reason and authority, we think, is against this view. There is an obvious difference between the two transactions. It is contrary to public policy for a person to insure a life in which he has no insurable interest, and to derive benefit or advantage therefrom. This is condemned as gaming or wagering on the chances of human life, and as such, is prohibited by law. But it is lawful for one to insure his own life, and after he has done so, the policy becomes his own, if payable as in this case, and there is no good reason why he may not sell or dispose of it as he may of any other chose in action, if the policy was valid in its inception. *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496; *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y. 31; *Mut. Life Ins. Co. v. Allen*, 138 Mass. 24; *Valton v. Assurance Co.*, 20 N. Y. 82; *Olmstead v. Keyes*, 85 N. Y. 993; *Ashley v. Ashley*, 3 Sim. 149; *Currier v. Cont. Life Ins. Co.*, 52 Am. Rep. 134, note; *Bussinger v. Bank, etc.*, 80 N. W. Rep. 290.

"A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business or absolute necessity may require him to do so. He may have paid large sums in premiums, and afterward become unable to pay any more, and if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed and lost. To impair the value and utility of his policy, or require him to lose it, on the ground that if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one

Bursinger v. Bank of Watertown.

who had no insurable interest in his life would be tainted with the vice of gambling, is, as matter of law, extremely fanciful and unsatisfactory.

"Other interests and conditions generally prevalent, and involving tendencies quite as fatal to human life, may be created and are maintained without any such restriction. It seems that a life-tenant would be in about as much danger from the remainder-men, and a testator from a person having no interest in his life, for whom he had made provision by will, as the insured would be from the assignee or purchaser, without interest, of a life insurance policy. An insurable interest in the assured, at the time the policy is issued, is essential to the validity of the policy, but it has often been decided, as where a creditor takes out a policy on the life of his debtor, that it is not necessary to the continuance of the insurance that the interest in the life insured should continue. Cessation of interest, payment of the debt in the case supposed, would not terminate the policy. *Dalby v. India Ass. Co.*, 15 C. B. 365; *Law v. London Policy Co.*, 1 Kay & J. 223; *Conn. Ins. Co. v. Schaefer*, 94 U. S. 457; *Rents v. Am. Ins. Co.*, 27 N. Y. 282; s. c., 84 Am. Dec. 283; *Provident Ins. Co. v. Baum*, 29 Ind. 236; *Currier v. Continental Ins. Co.*, 52 Am. Rep. 134, note.

"If the danger to life is not adequate to avoid the policy in such case, when the interest in the life insured ceases, it is not perceived why it should be deemed sufficient to invalidate a contract by which a policy is sold and assigned to one without interest. Besides the protection should not be overlooked which is afforded to the life insured by the doctrine that one cannot recover insurance money payable on the death of a party whose life he has taken by felonious means. It would be a reproach to the law of the land if he were allowed to do so. He could not in fact do so, any more than he could recover insurance money on a building which he had wilfully set fire to and burned. *Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591.

"In *Mutual Life Insurance Co. v. Allen*, *supra*, the Supreme Court of Massachusetts, after removing all doubt as to the meaning of the decisions in that State on the subject, and referring to the *dicta* in *Cammack v. Lewis*, 15 Wall. 643, and *Warnock v. Davis*, 104 U. S. 773, and *Franklin Ins. Co. v. Hazard*, 41 Ind. 116, and showing that it was not decided in either of these cases that all assignments of life insurance policies without interest are illegal, said 'that the right to receive money on the death of another is assignable at law or in equity will not be questioned. It is true that every person who is in expectation of property at the death of another has an interest in his death, but it does not follow, and it is not true, that the law does not allow the possession and assignment of such expectations. The objection applies with equal force to the assignment of a provision made for one upon the death of another by deed or will, as to the assignment of a like provision in the form of a life insurance. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his own advantage, and the fact that the assignee has no insurable interest in the life insured is neither conclusive nor *prima facie* evidence that the transaction is illegal.'

"We are unable to subscribe to the doctrine that the assignee or purchaser of a life insurance policy, valid in its inception and transferred according to its terms, is not entitled to its proceeds, by reason of his want of interest in the life insured."

Bursinger v. Bank of Watertown.

In *Price v. Supreme Lodge Knights of Honor*, Texas Supreme Court, it was held that the assignment by one of an insurance policy issued upon his own life to his cousin who lives with him as an adult male member of the family, and is independent of the insured for employment and support, upon an agreement by the assignee to pay the assessments necessary to keep the policy in force, is void. The court said: "It is almost universally conceded that policies procured by persons having no interest in the life of the insured are void at common law, as against public policy. The policy-holder has nothing to lose for which he can claim indemnity; on the contrary, his interest is in early death of the insured. When that occurs he ceases to pay premiums, and receives the amount of the policy. This creates a temptation to destroy human life, and the common law forbids the contract. These are the grounds upon which such policies are held to be void. Are they applicable to a case where the policy is first taken out by the person whose life is insured, and then transferred by him to one who has no interest in his life? It is pretty generally held that if a person effects insurance upon his own life, and in pursuance of a previous agreement, immediately, and without consideration, transfers the policy to one who has no interest in his life, but who agrees to pay the premium upon the policy, it will be void. *Swick v. Ins. Co.*, 2 Dill. 160; *Stevens v. Warren*, 101 Mass. 564; *Moury v. Ins. Co.*, 9 R. I. 346. And it has been held by the Supreme Court of the United States that a transfer would not be enforced under such circumstances, though the insured were indebted to the assignee in a small sum disproportionate to the amount of insurance on his life; but the policy would be deemed security for the debt, and such advances as might afterward be made on account of it. *Cummock v. Lewis*, 15 Wall. 643. Is there such difference between the principles upon which these decisions rest, and those applicable to the sale of a policy already procured to an assignee having no interest in the assured, as to make the latter lawful, while a policy procured without interest, and an assignment in pursuance of a previous agreement, are held invalid? The Supreme Court of the United States, in the case of *Warnock v. Davis*, 104 U. S. 775, says it cannot see any such difference; and proceeding upon this view, many of the State courts have held such assignments void, or treated the assigned policies as mere securities for the moneys actually advanced by the assignee. *Ins. Co. v. Hassard*, 41 Ind. 116; *Ins. Co. v. Sefton*, 53 Ind. 380; *Ins. Co. v. Sturges*, 18 Kan. 93; *Gilbert v. Moses*, 104 Penn. St. 74; *Baye v. Adams*, 81 Ky. 363. This too is the conclusion to which many eminent text-writers have arrived. *May Ins.*, § 398; *Greenh. Pub. Pol.* 238. On the contrary, the courts of several States have held such assignments valid, though the assignee could not have taken out for his own benefit an original policy upon the life of the assignor. *Clark v. Allen*, 11 R. I. 439; *Marcus v. Ins. Co.*, 68 N. Y. 625; *Clark v. Durand*, 12 Wis. 223; *Ins. Co. v. Allen*, 138 Mass. 24. We think those decisions which hold these assignments invalid are based upon the more satisfactory reasoning. When the policy is transferred it becomes the property of the assignee. He is subject to all the obligations imposed by it, and entitled to all its benefits. He becomes the holder of a policy upon the life of a person whose early death will bring him pecuniary advantage. The temptation to

 Ellis v. Milwaukee City Railway Company.

bring about this death presents itself as strongly to him as to a party who originally effects insurance for his own benefit upon the life of another. Public policy removes the temptation to take human life, and it cannot matter how that temptation is brought about. If by reason of a contract between two persons the one is tempted by pecuniary interest to destroy the other, the form of the contract is of no importance in testing its invalidity. The law looks to the substance of the matter—the relation which the parties will bear to each other after the contract is executed; and if its natural effect is to encourage crime, it will be avoided, no matter in what shape it may be presented. Those courts holding a contrary view say that a policy of insurance is a chose in action, and the owner may dispose of it as he pleases. But when it is asserted that the owner of property may dispose of it at his pleasure, the assertion must be taken with the qualification that he does not thereby violate any provisions of law, or contravene public policy. It is further said, that because a contract is speculation, though human life be the subject of the speculation, it is not necessarily invalid; for instance, it is not unlawful to transfer an annuity, or an estate in remainder after a life estate. If this reasoning be good, it would validate a policy taken by one having no interest in the life insured, as well as an assignment of a policy to such a person, for it is not unlawful to grant or create an annuity, or an estate in remainder after a life estate, any more than it is to transfer one of these after it is created. Yet wager policies are almost universally held void, while annuities are sustained. Why this should be is not necessary to discuss. It is sufficient that no analogy drawn from annuities or life estates can be used to uphold policies procured in violation of public policy, and hence no such analogy of this kind can sustain an assignment of the same character."

 ELLIS V. MILWAUKEE CITY RAILWAY COMPANY.

(67 Wis. 135.)

Railways — street — ordinance fixing fares — separate lines to different termini.

A municipal ordinance provided that the fare on any horse railway in the city should not exceed five cents. When it was enacted the defendant was operating a single line of railway. Afterward it constructed and operated other lines diverging from the main line. *Held*, that the ordinance did not confer the right, upon payment of five cents, to ride on a car bound for one *terminus*, and at the point of divergence, to take another car to a different *terminus*.

ACTION for unlawful ejection from a street car. The opinion states the case. The plaintiff had judgment below.

Finches, Lynde & Miller, and B. K. Miller, Jr., for appellant.

Small & Hopkins, for respondent.

Ellis v. Milwaukee City Railway Company.

ORTON, J. The plaintiff and respondent on this appeal, in June, 1885, entered one of the cars of the defendant company, at the corner of Fourth avenue and Mitchell street, in the south part of the city of Milwaukee, for the purpose of going to the base-ball ground at the corner of Twelfth and Wright streets, in the north part of said city, to which point one of the cars of said company ran on one line of its road. He was informed by the conductor, when he offered to pay his fare of five cents, that the car he was on did not run to that point, and that to go there he would have to take another car, but that he could ride on that car as far as it ran on that line, and then he would have to take another car and pay another fare of five cents on the same. The plaintiff then asked the conductor if he would not give him, at the point of divergence, a transfer ticket which would entitle him to ride to his destination, and the conductor told him that he could not, and he then paid his fare. At the point where the road to the base-ball ground diverged from the line on which that car ran, the plaintiff again demanded a transfer ticket, which was again refused, and he left the car, and waited a short time for the arrival of another car bound for his destination, and then entered that car. The conductor of that car asked the plaintiff for his fare, and he replied that he had paid his fare on the Third street car and refused to pay more fare. He was informed that if he did not pay he must leave the car, and he replied that he would not do so. The conductor delayed putting him off until he had made three other demands for his fare, and he had refused, and then he stopped the car at a crossing and by no great display of force put the plaintiff off. He landed on his feet, and suffered no injury, although he and the conductor were somewhat excited. After being thus put off, he almost immediately jumped on the car again, and paid his fare under protest, and rode to his destination.

On the 23d day of October, 1871, the common council of the city passed an ordinance amending an ordinance of March 26, 1866, to amend an ordinance entitled "An ordinance to authorize the construction and operation of certain horse railways in the city of Milwaukee," passed May 29, 1865, as follows:

"Sec. 2. Hereafter the rate of fare for a single passenger in any horse railway operated within the city of Milwaukee shall not exceed the sum of five cents."

This ordinance was declared to have been passed for the sole

Ellis v. Milwaukee City Railway Company.

purpose of preventing extortion by the said company. At the time the ordinance was passed this company was operating only one line of railway, north and south, near the center of the city, and near the Milwaukee river, and all cars thereon went to the same points of termination, and so far as this company was concerned, this ordinance affected only this line of road as then operated. Afterward, and before the year 1883, this company had constructed at least four lines of road diverging from the main line toward the south and toward the north to as many points of termination and localities, and one of these lines ran to the base ball grounds, the destination of the plaintiff. The car upon which he took passage did not run to that point, but to a point south of and quite distant from it. When these lines of road were built, by a regulation of the company as many different lines of cars ran upon the main line and to these several terminations, and these various lines were operated as distinct and separate lines of road. When in 1882, the company was about to construct a line of road diverging from the old main line and running along Chestnut street, the common council passed an ordinance authorizing such extension, and providing that such new line should be operated in connection with the main line, and that only one fare of five cents should be charged for the whole route, and that at the point of intersection a transfer ticket should be given to the passenger going on such new line. Since the other diverging lines have been built and operated no ordinance has been passed relating thereto, in respect to rates of fare or transfer tickets, but these several lines are left to be governed, if at all, by the ordinance of 1871, as to the rate of fare. It appears that the company, on the completion of these several lines, for one year only adopted the plan of giving transfer tickets on all of them; but they found that, under such a regulation, passengers could defraud the company by getting on a line, going west a short distance, then going south a short distance, and then going back, and passing around a circle; and the company then abandoned such a general regulation; and has since given transfer tickets only on the Chestnut street line, as required by said ordinance.

This is a brief and substantially correct statement of the case. The plaintiff brought this suit to recover damages for being thus expelled from the car, and recovered \$150.

On the conclusion of the plaintiff's testimony, as stated substan-

 Ellis v. Milwaukee City Railway Company.

tially above, there was a motion for a nonsuit, and at the conclusion of the evidence on both sides, the defendant company moved for a verdict by direction of the court, which was denied.

1. We think that the regulation or custom of the company, by which several distinct and separate lines of cars are run between different *termini*, is a reasonable one. The various lines could not be operated in any other way to accommodate the travelling public. *Yorton v. M., L. S. & W. R. Co.*, 54 Wis. 234.

2. We are quite confident that the ordinance of 1871, fixing the rate of fare, has no application to the connecting lines of road afterward constructed. The rates of fare of passengers on the road of such a corporation ought to be reasonable, affording a reasonable compensation to the common carrier, and imposing no unreasonable burden upon the passenger. *Att'y-Gen. v. Railroad Cos.*, 35 Wis. 425. It may be conceded that the common council of Milwaukee had the right and authority to fix such reasonable rate by ordinance; but such rate should be fixed so as to give the company reasonable compensation for its service, in view of the location and length of its road. In respect to railways operated by steam-power through the country, such rates for passengers, where fixed by law, are generally, if not always, rated per mile. In such cases, the length of lines and distance of travel would make no difference. On horse railways, the fare is generally fixed at a certain sum for a given line of road, arbitrarily; but should, of course, be so fixed as to be reasonable, and proportionate to the service rendered to the passenger and to the profits of the company. It is presumed that the common council fixed the rate, in 1871, in view of this rule, and took into consideration the location, business, and length of the main line then in operation. Suppose the legislatures of Illinois and Wisconsin had seen fit to fix the passenger fare on the Chicago and Northwestern railway at the arbitrary rate of five dollars as soon as the road had been completed from Chicago to Madison, and that company had then no other line. Afterward the line was extended, and many intersecting lines had been built. Would that rate continue, by the mere force of such a law, as the rate from Chicago to the distant terminus of its line and to any *termini* of connecting lines? If so, the rate would be most unreasonable against the company, and the company would derive no compensation or profit whatever from such extended and new lines. If the rate was reasonable when the line

Ellis v. Milwaukee City Railway Company.

had its *termini* at Chicago and Madison, as it must be presumed it was, then such a fixed rate becomes more and more unreasonable as the line is extended, and connecting lines are built, and increased service is rendered, at great additional cost to the company. So, in this case, the common council fixed this arbitrary rate, presumed then to be reasonable, on the old and main line of road. That line has been extended, and connecting lines have been built, since such rate was fixed; that rate was fixed without any reference to the present state of things, or new lines, and with reference only to the roads then existing; and hence we say that the ordinance of 1871 has no application to the connecting lines since constructed.

The common council, as the legislative body in respect to such ordinances fixing the rate of passenger fare over its lines of street railway, has placed such a legislative construction upon the ordinance of 1871 by another ordinance of 1882, by which the same rate is continued on the main line and on the first connecting line, and a transfer ticket required to be given. On the subject of the fare on the main line and the other connecting lines, the common council has not acted. The ordinance of 1871 has been treated as if made with special reference to this road. What has been said would be true of all other roads in their then condition, and in respect to their new lines.

3. It would not seem to be material whether the ordinance of 1871 actually fixed the rate of passenger fare on the main line and over the connecting lines since built, or not; for the company conceded to the plaintiff the right to go upon the car he was on to the end of its route on one of the connecting lines, for the fare he had paid; and also the right to have gone over the main line and the connecting line to his destination for the same fare, if he had taken the proper car of the company which ran on that line. We have already said that the regulation or custom by which these several lines of cars were run on the several lines of road was reasonable and probably necessary. The plaintiff was informed of this regulation before he paid his fare. The company had provided for him cars to his destination, and all he was required to do was to go aboard of such cars. He chose not to do so, but to go aboard of the wrong car, and demand that he might be carried to his destination on one fare of five cents, and to be transferred to another line for that purpose. These matters are proper subjects of legislation by the common council, and until they pass an ordinance

Saveland v. Fidelity and Casualty Company of New York.

changing the rate of fare, or fixing the rate of fare over all the lines of road, and requiring transfer tickets from one road to another to be given to passengers, the traveling public must comply with and abide by the present regulation. Such a regulation is binding upon travellers having knowledge of it. *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; *Wakefield v. South Boston R. Co.*, 117 Mass. 544. In this last case the passenger had paid his fare on two connecting lines of the road, and claimed to ride a third line. He was ejected from the third car, and was not allowed to recover. In *McMahon v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 282, it was held that a similar regulation was binding upon a passenger, if known to him.

The plaintiff could easily have taken the proper car and gone to his destination on one fare. But he chose to violate a reasonable regulation of the company, by going upon the wrong car and demanding of the conductor a transfer ticket, which the conductor, by such regulation had no right to give, and he knew it. Until the company's rates are fixed by law for a transfer of a passenger to another line of its road, the company has a right to fix such rates as are reasonable, and there was no evidence in this case that such rates were not reasonable. The jury should have been instructed to find a verdict for the defendant. If the plaintiff had been entitled to recover at all in this case, he was only entitled to nominal damages. He was ejected from the car by the conductor, whose duty it was to do so, after repeated warnings, in an unusually careful and prudent manner, without inflicting upon him any personal injury. *Yorton v. M., L. S. & W. R. Co.*, *supra*. But he was not entitled to recover, and therefore the excessive verdict is immaterial.

BY THE COURT. — The judgment of the County Court is reversed and the cause remanded with directions to that court to grant a new trial in the cause.

SAVELAND V. FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(67 Wis. 174.)

Insurance — accident — "total disability."

A policy provided that in case of accidental injuries which should "wholly disable and prevent him from the prosecution of any and every kind of busi-

Saveland v. Fidelity and Casualty Company of New York.

ness pertaining to his occupation," the insured should be indemnified against loss of time thereby "for such a period of continuous total disability" as should immediately follow, not exceeding, etc. In an action thereon, the jury were instructed that the defendant was liable if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor, to some extent." *Held*, error.

ACTION on an accident policy. The opinion states the point. The plaintiff had judgment below.

A. G. Weissert, for appellant.

J. E. Wildish and J. C. Officer, for respondent.

CASSIDAY, J. The cause was submitted to the jury on the theory that it was the object of the policy to insure the plaintiff against accident, and to pay the plaintiff what the company had agreed to pay for the accident he had received, if by that accident he had been disabled in any way from prosecuting the business in which he was engaged; that it was to indemnify the plaintiff "for his want of capacity to prosecute the business in which he was engaged;" that the plaintiff was "entitled to recover, at the rate agreed on in the policy, for such time as by reason of such accident he" was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent." The learned trial judge was supported in such theory by the language of the court in *Sawyer v. U. S. Casualty Co.*, 8 Am. Law Reg. (N. S.) 233. The clause of the policy there involved was, "totally disable him from the prosecution of his usual employment." The case was in the Superior Court of Worcester, Massachusetts, but never reached the Supreme Court of that State, nor do we find it referred to in any subsequent case in any court. That case apparently followed *Hooper v. Accidental D. Ins. Co.*, 5 Harl. & N. 546, where the clause of the policy relied upon was, "any bodily injury to the said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits;" and it was held, in effect, that a disability which incapacitated the assured from "following his usual occupation, business, or pursuits," was a

Saveland v. Fidelity and Casualty Company of New York.

breach. In neither of those cases was the language of the policy so broad and sweeping as in the case at bar. The language of this policy is even more sweeping than in *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. 77, where it was held that there could be no recovery because it was not shown that there was a "total disability to labor." In that case the language of the policy was, "accident and injury, which totally disabled and prevented from all kinds of business." The same is true with respect to *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa, 631, where the language of the policy was, "while totally disabled and prevented from the transaction of all kinds of business;" and it was held that such language could not be construed to mean "partially disabled from some kinds of business."

Here the plaintiff was only entitled to recover in case the injury was such as to "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation," and then only "for such period of continuous total disability," not exceeding the amount stipulated, nor "the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks." The ordinary object of a policy of insurance may be such as stated by the learned trial judge, but the manifest purpose of this policy was to obtain premiums by incurring as little risk as possible. But there was no law to prevent the parties from making their own contract. The plaintiff consented to and made this one. He cannot repudiate or alter its conditions in the day of his calamity. The courts are powerless to make a new contract for him or to strike some words from the contract he made for himself, and insert others, and thus enlarge the risk, in order to meet the expectation of the plaintiff in obtaining the policy. This we should be compelled to do, in order to sanction the charge to the jury. The plaintiff's right to recover is necessarily restricted to the time he was wholly disabled and prevented "from the prosecution of any and every kind of business pertaining to his occupation."

By THE COURT: The judgment of the County Court is reversed, and the cause is remanded for a new trial.

Von. L. Will — 108.

HUBBELL V. CITY OF VIROQUA.

(97 Wis. 343.)

Municipal corporation — negligence — nuisance — shooting gallery.

A city licensed a shooting gallery. It was a mere tent adjoining a sidewalk. The plaintiff in passing was injured by a ball coming through the tent. *Held* (1), that the structure did not constitute an "insufficiency" of the street, within the statute; (2), that a shooting gallery in a city is not *per se* a nuisance.*

Proctor & Skaar, for appellant.

O. B. Wyman, for respondent.

TAYLOR, J. Upon the hearing of this appeal the learned counsel for the appellant contends (1) that the complaint sets up a good cause of action against the city under the provisions of section 1339, Revised Statutes 1878, which provides that "if any damage shall happen to any person, his team, carriage, or other property, by reason of the insufficiency or want of repairs of any bridge, sluiceway or road in any town, city or village, the person sustaining such damage shall have the right to sue for and recover the same against any such town, city or village;" and (2) that the complaint states facts sufficient to constitute a cause of action against the city for knowingly permitting the erection and maintenance of a public nuisance in said city.

It seems to us very clear that there are no allegations in the complaint which show any insufficiency or want of repair of the street or sidewalk so as to bring the case within the provisions of the statute above quoted. The shooting gallery was neither in the street, nor within the boundaries of the sidewalk, but outside of the same, presumably upon private property, and no more obstructed the sidewalk than any other building erected adjoining such walk. A highway may be insufficient, within the meaning of the statute, on account of a precipice or excavation immediately adjoining the travelled part thereof, unless a barrier be placed along such precipice or excavation. It may be insufficient if a dangerous structure is permitted to overhang a travelled part

* See *Taylor v. Mayor, etc.* (64 Md. 63), 54 Am. Rep. 759; *Blumb v. City of Kansas* (84 Mo. 113), 54 Am. Rep. 87, and note, 90.

Hubbell v. City of Viroqua.

thereof, or by permitting excavations under the surface of the street, which render the same dangerous, or by defects or obstructions upon its surface. But we can find no case where a street or highway has been held insufficient or out of repair within the meaning of the statute, by reason of the erection of a tent, house, or other structure upon private property outside the limits of the street or highway. Persons erecting such structures near a public highway, if they erect or maintain them in such manner as to interfere with the safety of persons travelling such highway, may be answerable for any damage caused by the existence of such structures to persons travelling such highway; but they do not constitute an insufficiency of the highway itself within the meaning of the statute, so as to render the town, city, or village in which they are situated liable for the damage caused by their existence. The following cases in this and other courts fully establish this proposition. *Schultz v. Milwaukee*, 49 Wis. 254, 259; *Ray v. Manchester*, 46 N. H. 59; *Hutchinson v. Concord*, 41 Vt. 271; *Little v. Madison*, 42 Wis. 643; 49 Wis. 605; s. c., 24 Am. Rep. 435; *Hixon v. Lowell*, 13 Gray, 59; *Jones v. Boston*, 104 Mass. 75; s. c., 6 Am. Rep. 194; *Wood Nuis.* (2d ed.) 825, and notes; *Norristown v. Fitzpatrick*, 94 Penn. St. 121; s. c., 39 Am. Rep. 771; *Lorillard v. Monroe*, 11 N. Y. 396; s. c., 62 Am. Dec. 120; *Pierce v. New Bedford*, 129 Mass. 534; *Barber v. Roxbury*, 11 Allen, 318; *Lyon v. Cambridge*, 136 Mass. 419; *Macomber v. Taunton*, 100 Mass. 255.

Although it is apparent from the form and general allegations of the complaint that the learned counsel who drew the same intended to state a case against the city under the provisions of the statute above quoted, he now insists that if he has failed to make out a case under that statute there is sufficient to show that the city knowingly permitted a public nuisance to exist in the city, adjacent to a public street, which endangered the lives of persons travelling upon such street, and consequently the city is liable for the injury which happened to the plaintiff from the existence of such public nuisance.

Whatever may have been decided by other courts upon this point, this court has held in the cases of *Little v. Madison* and *Schultz v. Milwaukee*, *supra*, that an action will not lie against a municipal corporation for not suppressing a public nuisance within the municipality, when such nuisance is not created or maintained by the express authority of the municipality, and when such public nui-

Hubbell v. City of Viroqua.

sance is not the result of some act done, or neglected to be done, in the performance of a duty imposed upon the municipality by law, such as repair of streets, constructing sewers, water or other public works. This doctrine is well sustained by authority. See *Nerriestown v. Ellipterick*, 94 Penn. St. 124; s. c., 39 Am. Rep. 771; *Elliot v. Philadelphia*, 75 Penn. St. 347; s. c., 15 Am. Rep. 591; 2 Dill. Mun. Corp. (3d ed.), §§ 975, 976; *Buttrick v. Lowell*, 1 Allen 172; s. c., 79 Am. Dec. 721; *Cole v. Newburyport*, 129 Mass. 594. A municipal corporation is not liable for injuries caused to the persons or property of the citizen by the criminal acts of individuals unless made liable by statute. 2 Dill. Mun. Corp. (3d ed.), §§ 959, 960, 961; *Darlington v. New York*, 31 N. Y. 164, 187, 188; *Western College v. Cleveland*, 13 Ohio St. 375; *Prathers v. Lexington*, 13 B. Monr. 559; s. c., 56 Am. Dec. 585; *Ward v. Louisville*, 16 B. Monr. 184; *Griffin v. New York*, 9 N. Y. 456; s. c., 61 Am. Dec. 700; *Lay v. New York*, 1 Sandf. 465. When a public nuisance is created by a private citizen in carrying on his business or trade within a city or other municipality, unless the municipality by express license authorizes such business to be carried on at the place and in the manner the same is conducted by such private citizen, the municipality cannot be held responsible for any damage which may result to another citizen from the existence or maintenance of such nuisance.

This court also held in the cases above cited that the mere fact that the proper city authorities licensed the carrying on of such business within the city limits for a compensation paid for such license, does not render the city liable for an injury caused by its being carried on in an improper manner or at an improper place. If the thing licensed could be carried on without becoming a public nuisance if carried on in a proper place and proper manner, the city is not liable for the consequence resulting from its being carried on in an improper manner or in an improper place. If the city can be made liable at all for the results of carrying on the business in an improper manner or in an improper place, the allegations of the complaint and the evidence must show affirmatively that the license granted authorized the licensee to carry on the business in the manner and at the place which rendered it a public nuisance. A mere license to carry on the business generally within the city limits will not be construed to be a license to carry on the business in an improper place or in an improper manner.

Alexander v. Continental Insurance Company of New York.

"We cannot hold, as a question of law, that a shooting gallery erected in a proper place and conducted in a proper manner is a public nuisance. On the contrary, we are of the opinion that such a gallery is not a public nuisance at common law, and in the absence of any statute declaring it to be such, it must be considered a lawful business when carried on in a proper manner and place. The mere granting of a license by the municipal authorities to carry on a shooting gallery within the corporate limits of the city, was not therefore a license to keep and maintain a public nuisance within said limits, and the city is not chargeable for injuries resulting from an abuse of his license by the licensee. When the licensee creates a public nuisance by an abuse of the license granted to him by the city, the city is no more liable for the damaging results of such nuisance than it would be for the damage caused by any other public nuisance by a citizen, within the municipality, by carrying on his business in such city without a license from the city.

We are also inclined to hold that the allegations of the complaint do not clearly show that the shooting gallery, as it is alleged to have been conducted and in the place where located, was a public nuisance; but in the view we have taken of the case, it is unnecessary to decide that question.

BY THE COURT—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

ALEXANDER V. CONTINENTAL INSURANCE COMPANY OF NEW YORK.

(57 Wis. 422.)

Insurance—condition—notice—waiver.

An insurance premium note was received by the authorized agent of the company, who executed for it a receipt, on the back of which was a notice that fifteen days before any installment was due the assured would be notified by the company. *Held*, that the omission to give such notification waived a condition for forfeiture in the policy.

ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

O. H. Lamoreux and E. L. & Paul Browne, for appellant.

Charles W. Folger, for respondent.

Alexander v. Continental Insurance Company of New York.

TAYLOR, J. This action was brought upon a fire insurance policy to recover for a loss arising during the time covered by the policy. The insurance was for five years. A cash premium of \$11.75 was paid when the policy was issued, July 7, 1876, and a note given for the balance of the premium, to be paid in annual installments of \$11.75, on the 7th of July, 1877, 1878, 1879, and 1880. The first installment was paid on the note, not on the day it became due, but on the 4th of October, 1877. The subsequent installments were not paid, and the loss took place May 7, 1881. The policy contains, among other things, the following conditions: "This company shall not be liable for any loss or damage under this policy if default shall have been made in the payment of any installment of premiums due by the terms of the installment note. On payment by the assured or assigns of all installments of premiums due under this policy and the installment note given thereon, the liability of this company under this policy shall again attach, provided written consent of the superintendent of the western department be first obtained, and this policy be in force from and after such payment, unless this policy shall be void or inoperative for some other cause. But this company shall not be liable for any loss happening during the continuance of such default of payment, nor shall any such suspension of liability under this policy, on account of such default, have the effect of extending such liability beyond the period of its termination as originally expressed in writing hereon. It is further provided that no attempt, by law or otherwise, to collect any note given for the cash premium, or any installment or premium due upon any installment, shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive this policy. But upon payment by the assured or his assigns of the full amount due upon such note, and costs, if any there be, this policy shall thereafter be in full force, unless the same shall be inoperative or void from some other cause than the nonpayment of such note."

The complaint sets out the policy at length. It states the loss, and proof thereof; demand of payment, and refusal to pay; and in regard to the payment of the premium, the following allegations are made:

"And the plaintiff further alleges that at the time of said application for said policy, and the payment of said cash premium, and the execution of said premium note as aforesaid, the said John Gray, who was the authorized agent of said defendant company, executed

Alexander v. Continental Insurance Company of New York.

for and in behalf of said defendant, a receipt to said plaintiff for said application, cash premium, and said premium note, on the back of which receipt was a notice stating that fifteen days before any installment became due on said note the said plaintiff would receive notice from said defendant of the fact and the time when such installment so became due, which notice was read to said plaintiff by said agent, and by her relied on, and which this plaintiff alleges was given at the time of the execution of said note and was and is one of the conditions on which said note was given; that said agent, Gray, further informed the said plaintiff that said notice of fifteen days would surely be given to her by said defendant company, and which she relied on and expected to be given her as aforesaid.

“That the first installment of said note became due and payable on the 1st day of July, 1877, and that said defendant neglected to give her the said notice until on or about the 4th day of October, thereafter, at which time such notice was so given by an authorized agent of said company, and said plaintiff paid said installment of \$11.75 to said agent on the said 4th day of October, 1877.

“The plaintiff further alleges, that at the time of the payment of said first installment as aforesaid, the said defendant company, by its last aforesaid authorized agent, promised and agreed to and with the said plaintiff that the said defendant company would give her fifteen days' notice before the next and each unpaid installment became due, and would call upon her personally to pay the same, which promise and agreement the said plaintiff relied upon, and expected said notice from said company, but that since said time the said note has never been presented to her for the payment of other installments, nor has she ever been requested by said defendant company or any one in its behalf to pay the other installments or to send the same by mail or otherwise, nor has the said plaintiff ever had or received any notice whatever that any installment on said note had become due since the first installment paid as above set forth, and the plaintiff alleges on information and belief that said defendant company purposely and for its own advantage withheld the said promised notice, well knowing that the said plaintiff relied on the same, in order to defeat a recovery on said policy in case of loss. The plaintiff further alleges that said premium note has never been surrendered up to her, but that at the time of said fire and ever since said note was and is outstanding; that she has at all times been ready and willing to pay the other installments of

Alexander v. Continental Insurance Company of New York.

said note when the same became due, if the same had been presented to her by the owner or holder thereof, but the same was never presented to her for payment, or payment demanded of her, and she further avers that she had no knowledge of the whereabouts of said note, or in whose hands or possession it was or had been."

The defendant company demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrer, and from the order sustaining the demurrer the plaintiff appeals to this court.

The only question presented for our consideration on this appeal is whether the allegations above quoted from the complaint show a waiver on the part of the company of the condition in the policy that the company should not be liable for any loss or damage under the policy if default be made in the payment of any installment or premiums due by the terms of the installment note. We are clearly of the opinion that the payment of the money to become due upon the note, upon or before the day it became due, in order to continue the liability of the company on the policy, was waived by the agent of the company, and that the insured did not forfeit her rights under the policy by neglecting to pay the money on the note when it became due and payable by its terms. Against this view of the case the learned counsel for the respondent insists (1) that the agent of the company had no authority to waive this condition of the policy, and (2) that the facts alleged do not show any waiver.

The authority of the agent to waive the conditions of an insurance policy has been frequently asserted by this court as well as other courts. See R. S. 1878, § 1977; *Diner v. Phoenix Ins. Co.*, 37 Wis. 693; s. c., 9 Am. Rep. 479; *American Ins. Co. v. Gallatin*, 48 Wis. 36; *Schomer v. Hekla Ins. Co.*, 50 Wis. 576; *Roberts v. Continental Ins. Co.*, 41 Wis. 321; *Gans v. St. P. F. & M. Ins. Co.*, 43 Wis. 108; *Killips v. P. F. Ins. Co.*, 26 Wis. 472, 483; s. c., 9 Am. Rep. 506; *McBride v. Republic Ins. Co.*, 30 Wis. 562; *Parlier v. Amazon Ins. Co.*, 34 Wis. 363, 370; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Wright v. Hartford F. Ins. Co.*, 36 Wis. 522; *Winnis v. Allmania F. Ins. Co.*, 38 Wis. 342; *Sherman v. Madison Mut. Ins. Co.*, 39 Wis. 104.

This rule is absolutely necessary for the protection of the insured. The insured deals with no one but the agent; the company cannot deal with its patrons in any other way. Justice and law therefore require that the company shall be held to sanction what the agent

Alexander v. Continental Insurance Company of New York.

agrees to and upon which the insured relies. To allow the company to enforce a condition or forfeiture of the policy for a neglect to do that which the agent informs the insured shall not avoid the policy, would work the greatest injustice. This case is an illustration of the justice of the rulings of the courts upon this question.

The insured had taken a policy in which there is a condition that the policy shall terminate if any installment on the premium note is not paid promptly on or before the day it becomes due. The company has no place in the vicinity of the insured where the money can be paid. The agent says to the insured: "True, the policy says the liability of the company shall cease immediately if the money be not paid on the day, but I say to you, as agent of the company, that I will give you notice when payment is required." The insured, relying upon this promise of the agent, does not pay on the day. Two months or more after the day the agent appears and demands payment, and payment is made. No claim is made that there has been a forfeiture of the policy, or that it is necessary to have the policy renewed by procuring the written consent of the company in the manner prescribed in the contract, and the agent renews his promise to give notice when the next and subsequent installments should become due, and says he will call upon her personally for payment. No notice is afterward given, and no one calls for the money. The note is retained by the company, and not presented for payment, nor payment thereof demanded in any way, and in the meantime a loss occurs.

The condition or forfeiture in the policy having been once waived, and the insured having been led to believe that it would not be thereafter enforced, the company cannot enforce it except by an actual demand of payment of the money due on the note and a neglect or refusal to pay the same, or by a return of the note to the insured with notice that the company insists upon the condition in the policy. See *Marcus v. St. L. Mut. L. Ins. Co.*, '68 N. Y. 625; *Dilleber v. K. L. Ins. Co.*, '76 N. Y. 567; *Sheldon v. A. F. & M. Ins. Co.*, 26 N. Y. 460, 465; *Goff v. Nat. P. Ins. Co.*, '25 Barb. 189; *Devine v. Home Ins. Co.*, 32 Wis. 471, 477; *Howell v. K. L. Ins. Co.*, 44 N. Y. 276, 283; s. c., 4 Am. Rep. 675. See also many of the cases in this court cited above.

The case of *Dilleber v. K. L. Ins. Co.*, *supra*, was a case of a life policy, where prompt payment had been waived by the com-

Alexander v. Continental Insurance Company of New York.

pany; and afterward, when the insured offered to pay some days after the payment became due by the terms of the policy, the company refused to receive payment, and the insured shortly afterward died. It held there was no forfeiture. The court says: "It may be inferred that the company had waived a strict compliance with their written condition, and they also aid in the proper construction of the agreement of the parties made in April, 1860. Indeed, the conduct of both parties from the time of that transaction seems to indicate that they regarded it as a part of the arrangement of insurance, and the insured was not in fault in trusting to its continuance. The company was bound by it, and could not in good faith insist upon a strict compliance with the condition of payment until before a premium became due, they gave the insured notice that they should exact it. They cannot when their own interest seems to demand it, waive a condition, and after reliance upon it by the insured, withdraw the waiver without notice." The above argument is strictly applicable to the case at bar, upon the allegations made in the complaint, which, for the purposes of this case, are admitted to be true.

It is urged that the plaintiff should be held to have forfeited the policy because so long a time elapsed after the money became due and before the loss, and yet she had not paid or offered to pay. The fact of the lapse of time can make no difference. Either the terms of the policy had been waived, or they had not. If they had not been waived, then the forfeiture took place immediately after the money had become due and remained unpaid. A loss occurring on the day after would be within the condition and as fatal to a recovery as a loss two years after. As said above, the condition of the policy having been once waived, it could not be again revived without notice to the insured and a demand of payment of the money due.

It is also said that it would be unjust to allow the plaintiff to recover in this action, which was commenced after the statute of limitations had run against the note, and so the plaintiff would have the benefit of the insurance without payment of the premium. This objection, which certainly has an equitable foundation, is answered by a provision in the policy which reads as follows: "In case of any loss under this policy, this company may deduct any note, or installment thereof, given as a consideration for this policy." Under this clause of the policy, immediately upon a loss,

 Schaefer v. Osterbrink.

the right of the company to deduct from the amount due the assured for such loss attached, and it continues, though the assured might delay bringing suit for the loss until the statute of limitations had run against the note.

Conditions of the policy set out in the complaint in this case, and upon which the company rely to defeat the claim of the insured, though not strictly forfeitures, are of a similar character, and if the company intends to rely upon them to defeat a loss, it must see to it that nothing has been done by it or its agents which can reasonably be understood by the insured as a waiver of such conditions.

BY THE COURT. The order of the Circuit Court is reversed, and the cause is remanded with directions to overrule the demurrer.

Order reversed and cause remanded.

SCHAEFER V. OSTERBRINK.

(87 Wis. 495.)

Parent and child — negligence — agency of child.

Evidence that a minor son was in the habit of driving his father's team to convey the family to church, with the acquiescence of the father, and of an older daughter, who in the father's absence was in charge of the family, business and property, *held*, sufficient presumptively to charge the father with liability for the son's negligence in driving the team on another occasion.

ACTION for personal injuries by negligence. The opinion shows the case. The plaintiff had judgment below.

Bardeen, Mylrea & Marchetti, for appellant.

John Livermore and C. F. Eldred, for respondent.

CASSODAY, J. [Omitting other questions.] Exception was taken because the court charged the jury as follows: "The presumption is that a minor child living with his father and using his team and conveyance in and about the business of such father, is acting on his behalf and upon his directions, until the contrary is made to appear by the evidence. This fact established, and the burden to show that his son was not his servant is imposed upon the father." This is very nearly the exact language of Mr. Justice

TAYLOR in *Gerhardt v. Stetty*, 37 Wis. 37, and seems to be a sound proposition of law. We do not understand this portion of the charge as a direction to presume that at the time of the accident the son was engaged in his father's business. On the contrary, the court had previously treated the question "as to whether the son was or was not the father's servant at the time of the accident," as counsel do, "one of the disputed issues in the case," and accordingly had submitted it to the jury for determination.

"True," the court continued, "the driving of the father's team for the purpose of conveying members of the family to and from church, in accordance with the usual habit or custom of the family with the knowledge and approval of the father and without objection by the father, will be regarded as driving the team in and about the business of the father. No contract of hire is necessary to create the relation of master and servant. It is sufficient to create that relation that one charged as servant, whether a son or person in no way related, is permitted habitually to perform the work, drive the team, or otherwise to act as a servant of the owner, according to the circumstances of the case, with the knowledge and consent or acquiescence of the latter, or with the knowledge or acquiescence of the agent in general charge of the business or property of the owner; in the absence of the latter." "These instructions present the question whether the evidence of such prior habitual service on the part of Henry, his driving to and from church with his father's team, in accordance with the usual habit or custom of the family, with the knowledge or acquiescence of the father, and then, in his absence, of the older daughter in general charge of the business and property, was sufficient to justify the jury in finding that at the time and place in question, Henry was acting as the servant of his father and in the course of his employment. After a careful examination of all the facts and circumstances disclosed in the record and of the authorities cited by counsel, we are forced to the conclusion that the evidence is insufficient in law to sustain the verdict against the father as well as the son.

In *Bard v. Kohn*, 26 Penn. St. 483, cited, the son was several years past his majority, had a family of his own, and upon the occasion in question took his father's team without permission and was using them exclusively in his own business. Here Henry was a minor living with his father, and took his sister's coach as he had for years been accustomed to do with the knowledge of his

Garrey v. Stadler..

father.. In *Way v. Powers*, 57 Vt. 135, cited, the son was twenty-eight years of age, and the case is otherwise quite similar to the Pennsylvania case. The case of *Maddox v. Brown*, 71 Me. 432, s. c., 36 Am. Rep. 336, is more like this, for the son was a minor, but he was not using the horse and carriage in his father's business at the time.

That the jury were justified in this case in finding that the son was at the time acting as the servant of the father and in the course of his employment, see *Hoverson v. Noker*, 60 Wis. 513; *Gerhardt v. Swaty*, 57 Wis. 24; *Mulvehill v. Bates*, 31 Minn. 364; s. c., 47 Am. Rep. 796; *Evans v. Davidson*, 53 Md. 245; s. c., 36 Am. Rep. 400.

By THE COURT.—The judgment of the Circuit Court is affirmed on both appeals.

Judgment affirmed.

GARREY V. STADLER..

(67 Wis. 512.)

Contract — implied — to pay consulting surgeon..

A consulting surgeon, who at the request of the attending surgeon and with the consent of the patient renders services to the patient, may recover from the patient although the attending surgeon had agreed with the patient to pay therefor, but without the knowledge of the consulting surgeon.

ACTION for services: The opinion states the case. The defendant had judgment below:

Crosby & Pink, for appellant.

C. F. Eldred, for respondent.

TAYLOR, J. The appellant, a physician and surgeon, brought his action against the respondent to recover for medical and surgical services performed for and upon the person of the respondent. There is no controversy as to the fact that the services were performed by the appellant, and upon the person of the respondent; nor as to the value of such services. The respondent alleges, however, as a defense to the action, that at the time the services were

rendered one Dr. Fleischer was his attending physician and surgeon, and that the appellant was called in for consultation with Dr. Fleischer and to aid and assist him in a surgical operation to be performed on the person of the defendant; and he further alleges that there was an existing contract between the respondent and Dr. Fleischer, by which contract Dr. Fleischer was to pay for any assistance or consulting physicians or surgeons he might need in properly treating the defendant in his then present sickness; that the appellant was called by Dr. Fleischer to attend the defendant and to assist in a surgical operation which was proper and necessary in treating the defendant; and insists that the appellant must look to Dr. Fleischer for his pay. There is not a particle of evidence in the case showing that the appellant had any knowledge of the existence of the alleged contract between the defendant and Dr. Fleischer at the time the appellant performed the services for which he demands pay from the defendant; and the evidence further shows that the appellant was called in for consultation and assistance first by Dr. Fleischer, with the knowledge and assent of the defendant, and that he was present at the surgical operation at the request of the defendant himself. Upon this evidence it seems to us that the court would have been justified in directing a verdict for the plaintiff.

If he was not entitled to have the court direct a verdict in his favor, he was clearly entitled to have the jury instructed as requested in the third instruction asked by him, viz.: "If a physician, at the request of an attending physician, renders surgical services to a patient, even if there be an agreement between the attending physician and the patient that he, the attending physician, shall pay the expense of the surgical services of the consulting physician, the latter, being ignorant of such agreement, is entitled to recover, under an implied contract, from the party to whom and for whom such services were rendered, what the same are reasonably worth." Instead of giving this instruction, or one in substance like it, the learned Circuit judge submitted the case to the jury on the theory that if the defendant himself had reasonable grounds for believing that the plaintiff was in the employ of Dr. Fleischer, and that the plaintiff so understood it, then he could not recover. This instruction is, in substance, that if the plaintiff and defendant had both reasonable grounds for believing that the plaintiff was in the employ of Dr. Fleischer when he performed the ser-

Garrey v. Stadler.

vices for the defendant, then he could not recover. We think there was nothing in the evidence upon which this instruction could be based, so far as the plaintiff was concerned. There is nothing in the facts proven on the trial that tends to show that the plaintiff supposed he was in the employ of Dr. Fleischer. On the other hand, all the evidence tends to show that he understood that he was in the employ of the defendant, and that he had no reason for believing that he was in the employ of Dr. Fleischer. Whatever may have been the belief or understanding of the defendant on the subject, such belief could not release him from liability to the plaintiff for the services performed, in the absence of any evidence tending to show that the plaintiff had knowledge of the contract between him and Dr. Fleischer.

The case of *Shelton v. Johnson*, 40 Iowa, 84, is similar to the one at bar; but the facts set up in the answer, to which a demurrer was sustained in favor of the plaintiff, were more favorable to the defendant than the facts proved in the case at bar. In holding that the facts set out in the answer did not constitute a defense, the court say: "Where a party, knowingly and without objection, permits another to render service for him of any kind whatever, the law implies a promise to pay what the same is reasonably worth. If the plaintiff had been called to visit defendant by one having no pretext of agency or authority to do so, and defendant had, without objection, received the services of plaintiff, the law would imply a contract to pay for them. If this is the rule where no authority whatever is conferred, why is it not also the rule where a limited authority, such as that set forth in the answer, is conferred? The answer admits that Findley was authorized to call plaintiff to defendant's residence for the purpose of consultation. It alleges that the consultation was for the benefit of Findley, the attending physician, and was to be at his expense. It admits also that the plaintiff did not know of this arrangement between defendant and Findley. The understanding between the defendant and his attending physician introduced into the transaction an element unusual and exceptional, viz., that the consultation should be for the benefit, not of the invalid, but of the physician; and as a consequence of this agreement, the promise which the law implies is shifted from the defendant to his physician. Now as the effect of this agreement is to produce results unusual in their nature, the plaintiff ought not in justice

Garrey v. Stadler.

to be bound by it, unless he had knowledge of it." In this case the answer showed that Findley, the attending physician, had been very much criticised for his treatment of the defendant and his family, in which two deaths had occurred while he was treating them, and that Findley proposed the calling in of the consulting physician, at his own expense, for the purpose of showing that his practice was proper and not subject to such criticism; and for that reason the claim made by the defendant, that he should not be charged with the expense of consultation, had a more plausible ground to support it than in the case at bar, where the evidence shows that calling in the services of the consulting physician was solely for the benefit, and necessary for the proper treatment, of the defendant.

A similar ruling was made in a case in the same court, in favor of the services of attorneys who were brought into the case at the request of one of the defendants, who was also an attorney and had agreed to defend the action and pay all attorney's fees. The defendants were all held liable to pay for the services of the assisting attorneys, on the ground that the services were performed for the defendants with their knowledge and consent; the assisting attorneys not knowing of the agreement existing between them and the attorney who was their co-defendant. See *McGrary v. Ruddick*, 33 Iowa, 521.

Whether the rule of liability be as broad as stated by the learned court in the first case above cited, it is certainly broad enough to cover all cases where the service is performed for the personal comfort or convenience of the party with his consent and without objection or notice that such service is to be paid for by some other person. As the law in such case implies a promise to pay what the service is reasonably worth on the part of the person for whom such service is performed, such implied promise must be overcome by evidence showing that the person performing the service knew that there was a different arrangement for the payment of such service, to which he expressly or impliedly assented.

This rule is peculiarly applicable to the service of a physician. We think we are justified in assuming that it is quite exceptional for the members of that profession to undertake the treatment of their patients on special contracts by which they are to be paid a sum in gross, and by which they bind themselves personally with their patients to pay for any needed assistance in the proper

Schultz v. Chicago and Northwestern Railroad Company.

treatment of the case; and when such a case does occur in the profession, it is, as said by the learned court in the case above cited, an unusual and exceptional case, and one of which another physician called in consultation or otherwise is not bound to inform himself before rendering the required service. If the exceptional contract is to bind the consulting or assisting physician, it must be brought to his knowledge before his services are accepted by the patient; otherwise it can have no weight in determining the liability of the patient to pay for the service performed by such physician. See also upon this subject, *James v. Bizby*, 11 Mass. 34, 36 and the other cases cited by the counsel for the appellant in their brief.

BY THE COURT. — The judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

SCHULTZ V. CHICAGO AND NORTHWESTERN RAILROAD CO.

(67 Wis. 616.)

Master and servant — railroad — negligence — coal falling from tender — assumption of risk — co-servants.

A railroad track-walker sued the company for personal injuries by the fall of a lump of coal from a tender on which it was carelessly piled up. His own testimony showed that he knew the habit of thus overloading tenders and had seen lumps of coal on the track. *Held*, that he could not recover, (1), because he assumed the risk; (2) because there was not necessarily any negligence in this manner of piling the coal; (3) because the coal-heavers and firemen were fellow-servants with the track-walkers.

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

Winsor & Winsor, for appellant.

Jenkins, Winkler and Fish & Smith, for respondent.

OKTON, J. The plaintiff had been in the employment of the defendant company as track-walker from Elroy to Kendall, whose business it was to go over the track and see that every thing was in order, and if any thing was out of order to fix it, or if dangerous, to stop the trains. He had been thus employed about six months,

Schultz v. Chicago and Northwestern Railroad Company.

but had been employed along this portion of the track about other business of the company about four years, and was well acquainted with the passing of the trains and the management of things generally along that portion of the track. On the night of the 22d of April he started about six o'clock in the evening to walk his route or beat from Elroy to Kendall and when he had arrived near Kendall he found a bolt out of place and stopped to fix it; and while so engaged he saw the train coming out of Kendall, and he waited until it came about three lengths of a rail from him, and then he stepped off the embankment and down toward the water of a mill-pond there, about six or seven feet. The track came within a little over three feet from the top of the embankment, and there the bank sloped down to the water, and it was level at the bottom a short distance from the water. While he was thus standing on the fireman's side of the engine he looked into the engine as it passed and saw the fireman doing something in the cab, and when the tender was passing him he saw a dark object fall or was thrown from it, and it struck him in the side and injured him quite severely. He fell down, and was helpless, and was assisted to Kendall. He saw near where he lay a piece of coal about the size of a man's soft hat, and it appeared that that was what hit him, and that probably fell from the tender. He saw that coal on the tender was above the top of it before the train reached him. He had seen pieces of coal lying along the track, and knew that coal sometimes fell from the tender. Kendall was the regular station for loading coal to last to Baraboo. In the course of his business, he had usually met about eight freight trains and three or four passenger trains per day on that part of the track. It was about eight o'clock that evening when the accident occurred, and it was not very dark, but he had a lantern. He had before seen coal above the top of nearly every tender that passed on the road, but had never known coal to fall off in this way before. The same train usually passed him every day. The fireman usually loads at Kendall what he thinks is sufficient coal for the run. This is substantially all the testimony of the plaintiff and other witnesses for him.

The plaintiff sought to prove what had been the customary way of loading coal, as to piling it up above the top of the tender, about that time and for two or three years before. This was objected to, and the objection sustained. At the close of the plaintiff's testimony the Circuit Court granted a nonsuit in the case.

Schultz v. Chicago and Northwestern Railroad Company.

1. Was it error to reject the testimony offered as to the habit or custom of the company in respect to loading the coal so as to be above the tender, or as to piling it up? It is not contended by the learned counsel of the appellant that such evidence was proper for the purpose of showing negligence in this particular case; but it is contended that it was proper to show such general habit or custom for the purpose of showing notice to the company of such common and customary negligence, which ought to have been in some way corrected, and of showing that the company had affirmed, approved and assumed the negligence of its employees in this respect, and made their negligence its own. In other words, that the company had assumed all the responsibility and liability for the risk of such negligence. For such purpose, this evidence would have reacted upon the plaintiff to defeat his action; for the same evidence would have shown his own actual knowledge of such a common risk of his employment, and that he as well as the company had assumed them. If it was negligence in the company to have tacitly allowed the continuance of such a customary way of loading its cars after presumptive notice of it, equally so and more was it negligence of the plaintiff to continue in such a dangerous employment after actual knowledge of it, and he certainly had superior means of knowledge. *Hughes v. W. & St. P. R. Co.* 27 Minn. 141; *P. & C. R. Co. v. Sentmeyer*, 92 Penn. St. 280; s. c., 37 Am. Rep. 684; *Naylor v. C. & N. W. R. Co.*, 53 Wis. 664; *Hobbs v. Stauer*, 62 Wis. 110; *Ballou v. C. & N. W. R. Co.*, 54 Wis. 269; *Leary v. B. & A. R. Co.*, 139 Mass. 584; *Gibson v. Erie R. Co.*, 93 N. Y. 453; s. c., 20 Am. Rep. 552.

The testimony of the plaintiff was that he had seen the tender overloaded (as claimed) in this way often before, and had stepped aside and let the train pass as in this instance, and that he had seen pieces of coal on the track within his route or beat, and that way of loading the tender was nearly always and invariably so. If there was in this way of loading any such risk or hazard or danger to be anticipated or apprehended in this employment, by continuing in it without complaint or objection he assumed such risk and hazard; and he certainly could not recover if he happened at some time to be injured by such a customary mode of loading the tender with coal. First, then, by his own evidence and by the above authorities and the commonly accepted law upon that condition of the case, he ought not to recover, and the nonsuit was proper.

Schultz v. Chicago and Northwestern Railroad Company.

2. Was it negligence of the company, even if they know of such a customary method of loading the tenders on their road? Such an accident had never happened before from such a cause. It was a very strange and almost unaccountable accident. It was common to load the tender in that way, and it may have been actually necessary in order to provide coal enough to last to the next coal station. Is it negligence to pile or heap up the coal above the dead level of the top of the tender? In this way coal had always been carried without any danger of accident. The plaintiff had never expected, feared, or apprehended any danger from it, or he would have been sure to be out of the way when a train passed, or quit the employment of track-walker. Can this court say in this case, as a matter of law, that this way of loading the tender was or is *ipso facto* negligent.

Negligence is a question of law when the facts are undisputed as in this case. It might make a radical change in the size and capacity of the tender or in the distance between coal and wood stations, if the coal or wood must not be piled or heaped up above the level of the top of the tender. It would seem reasonable to put on the tender all the coal or wood it could safely carry, even above the top, and if by chance or by the jarring of the car over a rough road one single piece of coal or stick of wood should fall off and injure an employee who knows all about this usual way of loading the tender, and if he should notwithstanding place himself so near the side of the cars as to be injured by it, it would seem to be a mere mischance or accident, out of the common course of things, and against which the company, in the exercise of common care and prudence or of such care as all other railway companies exercise in such a case, is not required to provide. The act of negligence complained of is the piling of the coal up above the top of the tender. We cannot and dare not say that this was negligence *per se*. The company provided safe machinery, and the cars were managed with care, and the road-bed was perfect, and no complaint is made of any thing else, except that the coal-heaver at the station or the fireman crowned or piled up the coal on the tender in the very way that this plaintiff had always observed, and that all tenders were loaded, and without a single accident from such cause before this. This case, in this respect, falls within the principle of a mere accident, occurring unexpectedly and almost unaccountably from a common course of things in which it had never

Schultz v. Chicago and Northwestern Railroad Company.

happened before and is not likely to happen again, and is attributable to a cause not usually and scarcely ever followed by such a consequence. The case in this respect also falls within the decision of a similar class of cases of unexpected and unusual accidents where no recovery can be had, as in *Morrison v. P. & O. Canal Co.*, 44 Wis. 405; *Steffen v. C. & N. W. R. Co.*, 46 Wis. 250; and *Sorenson v. Menasha P. & P. Co.*, 56 Wis. 338.

For this reason also we think that the nonsuit was properly granted.

3. We do not think that this way of loading the tender with coal, however common or invariable, was notice to the company of such act or neglect as one of danger, hazard or negligence, so as to make the company liable. For that purpose the company must be presumed to know that the act was one dangerous in itself, or from its dangerous consequences or from its liability to injure those persons who should stand near the track of the road. But this the company or anybody else did not know, and could not know until some such unusual accident as this had happened. The company might know that this was the usual method and way of loading the tender, and not be liable. It must also know that it is dangerous in itself to do so, or that it is liable to produce injury to others. But no one ever dreamed of such a consequence as happened to the plaintiff in this instance. In such knowledge as the company had, or was presumed to have had from its usual occurrence, there was no duty involved to discontinue such a way of loading the tender, and from it no liability for its neglect of duty could possibly arise, for the company did not know, and had no reason to know, that it was its duty to discontinue this practice, and did not know that it was unsafe. Aside from this knowledge of the company, the company had not assumed any liability for the acts of its servants, and from such knowledge as the company might be presumed to have had of the practice because it was common and invariable, we do not think the jury would have had any right to find that it had assumed this act or practice of its servants, that was never before found to be hazardous or dangerous.

This car was loaded in this manner by the coal-heaver or fireman, as the co-employees of the plaintiff. Their grade of employment was no higher than his. There was no proof that they so acted as the representatives or under the orders of the company. If there

Schultz v. Chicago and Northwestern Railroad Company.

was negligence in this particular case, it was the negligence of the plaintiff's fellow-servants and not of the company, and the plaintiff therefore was not entitled to recover, according to numerous similar cases in the court, which from their great number need not be specially cited. For this reason, also, the nonsuit was proper.

Many other cases might be cited applicable to this case; as where an employee remains in the business or employment after he obtains knowledge of its risks, he cannot recover for an injury arising therefrom. *Kelley v. C., M. & St. P. R. Co.*, 53 Wis. 74; or as where an employee in a lumber yard is assisting in piling up lumber that is slippery and liable to fall, and that a slight jar would cause to fall upon him, and he is injured by the pile falling, he cannot recover. *Hoth v. Peters*, 55 Wis. 405.

[Minor point omitted.]

BY THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

INDEX.

ACTION

By State.] *See* CONSTITUTIONAL LAW, 590.

AGENCY.

Foreign agent—personal liability.] On a contract of affreightment, executed by a foreign agent, but disclosing the fact of the agency and the name of the principal, the agent is not personally liable. *Maury v. Ranger* (88 La. Ann. 485), 197.

See BANKS, 728; EVIDENCE, 562; NEGOTIABLE INSTRUMENT, 839; PARENT AND CHILD, 875.

ALIENATION.

Restraint on.] *See* WILL, 692.

ANIMALS.

Property—dogs.] No action lies for negligently killing a dog. *Jemison v. Southwestern Railroad* (75 Ga. 444), 476.

ASSIGNMENT.

Double, of chose in action—rights of assignees.] The *bona fide* purchaser of a chose in action, with authority to collect, takes it subject to the claim of one to whom the owner has previously assigned a part interest in it, for a valid consideration. *Fairbanks v. Sargent* (104 N. Y. 106), 490.

See CONTRACT, 598; INSURANCE, 848.

ASSIGNMENT FOR CREDITORS.

1. Condition for release—for return of surplus.] An assignment for creditors, with preferences, providing (1) for the *pro rata* payment of the other creditors in full satisfaction and release, and (2) for the return of any surplus to the assignor, is void on both grounds. *Gresley v. Dixon* (21 Fla. 413), 678.

2. Void conditions.] An assignment for creditors is void for providing that no creditor shall participate unless he accepts his share in full satisfaction, and for not designating a time within which they are to come in, and for providing that the trust shall be administered and closed under the supervision of the assenting creditors. *Collier v. Davis* (47 Ark. 367), 758.

See CONFLICT OF LAWS, 839.

ATTORNEY AND CLIENT.

Deposit of client's money in attorney's name — liability for loss.] Where an attorney deposits his client's moneys in a solvent bank, in his own name in a separate account, but with no indication of the trust, he is liable for loss by the subsequent insolvency of the bank, notwithstanding he was prevented from transmitting the moneys by garnishment proceedings against him. *Naltner v. Dolan* (108 Ind. 500), 61.

ATTORNEY.

Disbarment — city attorney.] The respondent was a salaried attorney of the city and county of San Francisco, having control of all its litigations. During his term of office he appealed from judgments rendered against it in certain cases in which he had no personal knowledge of the questions involved. After the expiration of his term he agreed with the attorney for the adverse parties, for a pecuniary consideration, not to be retained in those cases by the city and county. *Held*, unprofessional conduct for which he should be temporarily disbarred. *In re Coudery* (60 Cal. 32), 545. See CRIMINAL LAW, 662, LIBEL AND SLANDER, 574; PARTNERSHIP, 17.

AUCTION.

Evidence to vary condition.] As between the seller and the purchaser of goods sold at auction, evidence is admissible to vary the conditions of the sale publicly stated. *Mitchell v. Zimmerman* (109 Penn. St. 183), 715.

BAGGAGE.

See CARRIER, 468.

BAIL.

See CRIMINAL LAW, 181.

BAILEMENT.

Negligence — burden of proof.] In an action for the defendant's negligence in suffering a note given to him for collection to be barred by the statute of limitations, there is no presumption that he was to have compensation, and the burden of proof is on the plaintiff to show his liability. *Kinchloe v. Priest* (89 Mo. 240), 117.

BANKS.

Collections — agency — negligence.] A bank receiving for collection a check on a bank at another place, and intrusting it directly to that bank for payment, is liable to the depositor for loss by the failure of the drawee. *Merchants' National Bank of Philadelphia v. Goodman* (109 Penn. St. 422),

BETTING.

See CRIMINAL LAW, 633.

BIGAMY.

See CRIMINAL LAW, 670.

BILLS AND NOTES.

See **NEGOTIABLE INSTRUMENTS.**

BOND.

Conditional signing by surety.] Where a public officer procured the signatures of sureties on his official bond on the assurance that he would procure certain others, which he failed to do, the signers cannot evade liability if the obligee had no notice of the condition and the bond was complete in form. *Carroll County v. Ruggles* (69 Iowa, 289), 228.

CARRIER.

1. **Baggage — delivery.]** The plaintiff travelled a part of the way to her destination by the defendant's railroad, and on the next morning resumed her route by another connecting road, which used the same baggage-room and platform as the first, her trunk remaining in the baggage-room all night, and she retaining the check; before the train on the second road left, an employee of the first took the check, agreeing to place the trunk in proper position for transportation; but on reaching her destination, it was discovered that it had not been put on board the train, and it was never found. *Held*, that the defendant was liable. *Rome Railroad v. Wimberly* (75 Ga. 316), 468.
2. **Contributory negligence — passenger on freight train.]** A passenger in the caboose of a railway freight train, on the stopping of the train a quarter of a mile short of his destination, got up to walk to the door and was thrown down and injured by the sudden backing of the train. *Held*, that his negligence prevented his recovery of damages. *Harris v. Hannibal and St. Louis Railroad Co.* (89 Mo. 283), 111.
3. **Negligence — concurrent.]** Where a railway passenger is injured by the concurrent negligence of his carrier and another, the negligence of his carrier is not imputable to him. *Holeab v. New Orleans and Carrollton Railroad Co.* (83 La. Ann. 185), 177.
4. **Putting infant trespasser off train.]** A boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward in the day-time, on an ascending grade, where it could easily have been stopped, ran upon and killed the child. *Held*, that the railroad company was liable. *Indianapolis, etc., Railway Co. v. Pitzer* (109 Ind. 179), 887.
5. **Railroad — free pass — limitation of liability.]** *Annas v. Milwaukee and Northern Railroad Company* (87 Wis. 46), 848.
6. **— passenger riding on engine.]** One who by permission of the engineer of a freight train, acting as conductor, takes passage on such train and pays fare, is entitled to the privileges of a passenger, although the engineer has been forbidden to receive passengers on the train, provided the

CARRIER — *Continued.*

passenger does not know of such rules. *Hanson v. Mansfield Railway and Transportation Company* (88 Ia. Ann. 111), 162.

7. It is not negligent in such passenger to ride on the locomotive by direction of the engineer-conductor. *Id.*
8. Sleeping car company — duty as to passengers' effects.] *Lewis v. New York Sleeping Car Co.* (148 Mass. 269), 185.

See RAILROADS, 207.

CHATTEL MORTGAGE.

See MORTGAGE, 230.

CIVIL DAMAGE ACT.

Contributory negligence.] In an action by a wife under the civil damage act, for furnishing intoxicating liquors to her husband, it is not proof of contributory negligence to show that she was in the habit of letting him have portions of his wages previously deposited with her, having reason to believe he would spend them for such drink. *Huff v. Aultman* (69 Iowa, 71), 218.

CONFLICT OF LAWS.

1. **Assignment for creditors.]** An assignment for creditors, with preferences, made in New York by a debtor living there, and valid there, will be held valid in Michigan although the Michigan statute prohibits preferences. *Butler v. Wendell* (57 Mich. 62), 329.
2. **Death by negligence.]** An action cannot be maintained in Massachusetts against a railroad corporation operating its road as a continuous line in that State and in Connecticut under the laws of both, for the death of a person caused by the negligence of the corporation in Connecticut, the laws of the latter State not affording the like remedy. *Davis v. New York & New England Railroad* (143 Mass. 301), 138.

CONSTITUTIONAL LAW.

1. **Action by State — waiving tort and suing in assumpsit.]** Money was deposited in bank by a tax-collector, to the credit of "I. H. Vincent, treasurer," and checked out by him in the purchase of exchange on New York, the draft being made payable to himself as treasurer, and indorsed in the same way. The indorsee knew that Vincent was State treasurer. *Held*, that the indorsee was chargeable with notice of the official character in which the treasurer held the funds, and applying the money in payment of an individual indebtedness of the treasurer to him, he became liable to the State in an action for money had and received. *Wolfe v. State* (79 Ala. 201), 590.
2. **Contempt — refusal to produce books before legislative committee.]** A standing committee on elections of a house of the legislature, with power to send for persons and papers, may command a clerk of a court of common pleas, having custody of a poll-book, to produce it on an investigation, although this may involve the removal of the book to another county than that of his office, and on his refusal such house may commit him for contempt. *Ex parte Dalton* (44 Ohio St. 142), 800.

CONSTITUTIONAL LAW — *Continued.*

3. **Exemption — wages — waiver.**] The constitutional exemption of wages from garnishment may not be waived as to all future wages. *Green v. Watson* (75 Ga. 471), 479.
4. **Grant by city of railway privilege in streets.**] An irrevocable grant, by a city, of the exclusive privilege to construct and operate a street railway, is unconstitutional. *Birmingham & Pratt Mines Street Railway Co. v. Birmingham Street Railway Co.* (79 Ala. 465), 615.
5. **Impairing contract.**] A judgment for the repayment of money paid by mistake is not upon contract, and is protected by the Federal constitutional provision forbidding the enactment of laws impairing the obligation of contracts. *State v. City of New Orleans* (38 La. Ann. 119), 168.
6. **Vested rights.**] A change in the law prescribing the order of payment of the debts of a decedent does not impair the obligation of a contract nor a vested right. *McLure v. Melton* (24 S. C. 559), 272.
7. **Jurisdiction — as to delivery of election returns.**] Where election returns, as required by law, are directed to the speaker of the house of representatives, in care of the secretary of State, and are to be delivered by the secretary to the speaker, injunction will not issue to restrain the secretary from delivering them, on the allegation that they are wrongful and illegal. *Smith v. Myers* (109 Ind. 1), 375.
8. **Municipal ordinance — regulation of railroads.**] A city ordinance requiring street railway companies to report quarterly the number of passengers carried is valid. *City of St. Louis v. St. Louis Railroad Co.* (89 Mo. 44), 82.
9. **Ordinance prohibiting street walkers.**] A city ordinance prohibiting disreputable women from standing or loitering about the streets or stores at night, unless on unavoidable business, is valid. *Braddy v. City of Milledgeville* (74 Ga. 516), 448.
10. **Regulation of laundries.**] Under a statute authorizing a city to prohibit the erection of wooden buildings within limits where streets have been graded, it is competent to ordain that no laundry shall be carried on without special permit, unless in a brick or stone building. *Matter of Yick Wo* (68 Cal. 294), 12.
11. **Regulation of physician.**] The legislature may regulate the practice of medicine and surgery, and prescribe the qualifications of applicants for license. *Eastman v. State* (109 Ind. 278), 400.
12. **Tax on inheritances.**] A tax on gifts, legacies and collateral inheritances is constitutional. *Matter of McPherson* (104 N. Y. 306), 502.
13. **Sunday.**] See CRIMINAL LAW, 768.

CONTEMPT.

See CONSTITUTIONAL LAW, 800; MUNICIPAL CORPORATION, 158.

CONTRACT.

1. **Illegal — lottery.**] The owner of property, who disposes of it by lottery, may recover it from the drawer. *Martin v. Hodge* (47 Ark. 378), 768.

CONTRACT — *Continued.*

2. **Implied — to pay consulting surgeon.]** A consulting surgeon, who at the request of the attending surgeon and with the consent of the patient renders services to the patient, may recover from the patient although the attending surgeon had agreed with the patient to pay therefor, but without the knowledge of the consulting surgeon. *Garrey v. Stadler* (67 Wis. 512), 877.
3. **Labor tickets — assignability.]** A "labor ticket," or certificate for wages, issued by a corporation, and on its face "payable to employee only," and "not transferable," is not assignable. *Tabler v. Sheffield Land, Iron and Coal Company* (79 Ala. 877), 598.
4. **Lease or sale — coal in mine — taxes.]** A. agreed in writing with B., "leasing" to him, all the coal beneath the surface of a certain tract of land "owned by A. B. covenanted to mine and pay "royalty" for a certain number of tons every year whether mined or not. There were provisions for distress and forfeiture. The agreement was "perpetual until all the coal was mined," and it extended to the heirs, executors, administrators and assigns of the parties. B. covenanted to pay the taxes on all the coal mined. *Held*, not a lease but a sale of all the coal in place, and that B. was liable for all the taxes thereon. *Delaware, Lackawanna and Western Railroad Company v. Sanderson* (109 Penn. St. 583), 743.
5. **Of subscription for book in parts — breach.]** Under a contract of subscription for a book, to be published in parts, at a certain price for each part, to be paid for on delivery of each part, the subscriber, after receiving one part and paying for it, refused to take any more. In an action for breach of the contract, *held*, that he could not defend on the ground that he was induced to enter into the contract by fraud, without offering to return that part. *Barrie v. Earle* (143 Mass. 1), 126.
6. **Public policy — value of medical services.]** Where a doctor was employed by one injured in a railway accident, to explain his injuries to the company, on the agreement that if \$1,500 should be recovered for the injury, he was to have \$300, and if \$2,000, he should have \$500, *held*, that the agreement was illegal. *Thomas v. Caulkett* (57 Mich. 392), 369.
7. **By letter.]** A contract by letter is complete the moment an acceptance of the offer is mailed, providing it is done with reasonable promptness and before any intimation of withdrawal is received. *Kempner v. Coan* (47 Ark. 519), 775.
8. **Impairing.]** See CONSTITUTIONAL LAW, 168, 272.
See CORPORATION, 352; MASTER AND SERVANT, 838.

CORPORATION.

1. **Contract — ultra vires.]** A corporation is liable *quantum meruit* on a contract *ultra vires* but not immoral, and broken by the other party. *Day v. Spiral Springs Buggy Co.* (57 Mich. 146), 852.
2. **Negligence — boom company — consolidation.]** Two boom companies having booms on the same river were consolidated. Both were required by their separate charters to maintain booms sufficiently strong to retain

CORPORATION — *Continued.*

all the lumber contained in them, and by the act of consolidation the company was entitled to all the rights and privileges and subject to all the restrictions of the former charters. *Held*, (1) that the company was liable for loss by insufficiency of the boom, but not for unavoidable dangers or inevitable accidents; (2) that on proof of loss such insufficiency would be presumed; (3) that the company was not bound to maintain the lower boom sufficient to detain all the lumber carried away from the upper boom by the act of God, but for only such logs as were intended for it. *Brown v. Susquehanna Boom Co.* (109 Penn. St. 57), 708.

COVENANT.

1. **Against selling liquors — injunction.**] A condition in a deed that no intoxicating liquors shall ever be sold on the premises is valid, and although a forfeiture will not be enforced for a breach, yet an injunction may issue against it. *Watrous v. Allen* (57 Mich. 863), 863.
2. **Running with land.**] A covenant by a railroad corporation, in consideration of a grant of the right of way through plaintiff's land fifty feet wide on each side of the track, to erect a flag station at a point convenient to his house, to permit him to cultivate all the land embraced in the grant which was not needed for use by the railroad company, and if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land, and is binding on an assignee with notice. *Gilmer v. Mobile and Montgomery Railway Company* (79 Ala. 569), 623.
3. **To stand seised to uses.**] A husband executed to his wife an instrument in form of a warranty deed, to take effect at his death, and also conditioned "not to be in full force until I desire to act." *Held*, valid as a covenant to stand seised to uses. *Watson v. Watson* (24 S. C. 228), 247.

CRIMINAL LAW.

1. **Bail — indictment for different offense.**] On a complaint, charging A. with the crime of adultery, A. entered into a recognizance with sureties, conditioned that he should appear before the Superior Court at the next term "to answer to said complaint, and abide the order and sentence of the court thereon. * * * and not depart without leave." The grand jury, at that term, found an indictment against him for lewd and lascivious cohabitation; he pleaded guilty, but did not appear when called for sentence. *Held*, that there had been a breach of the recognizance. *Commonwealth v. Teebens* (143 Mass. 210), 181.
2. **Betting — raffle.**] A raffle with dice is a "bet" and a "game." *Long v. State* (22 Tex. Ct. App. 194), 633.
3. **Bigamy — evidence — proof of former marriage.**] On a prosecution for bigamy the former marriage cannot be established by presumptive evidence; there must be proof of an actual marriage. *Green v. State* (21 Fla. 403), 670.
4. **"Dangerous weapon."**] A razor is not a "dangerous weapon" within a statute specifying "such as bowie-knives, pistols, dirks, or any other dangerous weapon." *State v. Nelson* (38 La. Ann. 942), 202.

CRIMINAL LAW — *Continued.*

5. **Declarations — res gestæ.]** The statement of the deceased, ten minutes after he had been fatally shot, that "if he had not been so willing to fight he would not have been shot by the defendant," is admissible as a part of the *res gestæ*. *State v. Molisee* (38 La. Ann. 381), 181.
6. **Dying declarations — preliminary examination — exceptions.]** On a trial for murder, dying declarations being offered, the preliminary examination to ascertain their admissibility was conducted in presence of the jury. Certain parts of the declarations were allowed to go to the jury and others were excluded. *Held*, that exceptions could not be based on the reception in evidence on the preliminary examination of statements of the deceased not relating to the immediate circumstances of the death, and which were not allowed to go to the jury. *People v. Smith* (104 N. Y. 491), 537.
7. **Forgery — what constitutes.]** Forgery is predicable of the following instrument: "Apolas & Halsal, please let Mr. G. B. Rollins have 4\$00d. in goods and oblige. Charge to me. Joel E3ler." *Rollins v. State* (22 Tex. Ct. App. 548), 659.
8. **Former conviction — bar.]** A conviction of an aggravated assault, on an indictment for assault with intent to murder, does not bar a prosecution for murder for the subsequent death of the assaulted party in consequence of that assault. *Curtis v. State* (22 Tex. Ct. App. 227), 635.
9. **Homicide — duty to retreat.]** Where one is feloniously and dangerously assailed, he is bound to retreat, if he can do so without danger. (*State v. Donnelly* (69 Iowa, 705), 284.
10. **Indictment — caption — amendment.]** An indictment, headed with the name of the State and county, alleged the same county as the county where the court was holden, and then alleged "that the jurors of and for the county of aforesaid," did present, etc. *Held*, (1) that the omission might be supplied; (2) that it was not material. *State v. Moore* (24 S. C. 150), 241.
11. **Insanity — burden of proof.]** Where insanity is pleaded in excuse of homicide it must be proved by a preponderance of evidence. *State v. Bundy* (24 S. C. 439), 262.
12. —.] Mere drunkenness is no excuse for crime. *Id.*
13. —.] The test of criminal responsibility is the knowledge that the act was wrong. *Id.*
14. — test of.] An irresistible impulse to commit a crime does not excuse if the person knew what he was doing, and that it was wrong. *Leache v. State* (23 Tex. Ct. App. 279), 638.
15. **Continuance.]** The continuance of insanity is not presumed. *Id.*
16. — rule of evidence.] Where insanity is pleaded as a defense in a criminal case it must be proved beyond a reasonable doubt. *Danforth v. State* (75 Ga. 614), 480.
17. **Larceny — trick.]** The taking of money by confederates on a sham bet contrived by them to defraud a person who advances the money and takes part in the transaction, is larceny. *People v. Shaw* (57 Mich. 403), 372.

CRIMINAL LAW — *Continued.*

18. **Privileged communications to attorney.]** Communications made by a client to his attorney before the commission of a crime, and for the purpose of being guided or helped in its commission, are not privileged, although the attorney was innocent. *Orman v. State* (32 Tex. Ct. App. 604), 663.
19. **Rape—previous attempt—complaint—delay in making.]** On a trial for rape, evidence of an unsuccessful attempt by the defendant a few days previous is competent. *People v. O'Sullivan* (104 N. Y. 481), 530.
20. —.] Evidence of the first complaint of the prosecutrix, ten months after the offense, is incompetent. *Id.*
21. —.] The delay is not excused by threats of the defendant, a priest, to the prosecutrix at confession, that if she told of him she would go to hell. *Id.*
22. — declarations—details.] In case of rape, the victim's complaints of the commission of the offense may be proved, but not the details nor the name of the ravisher. *State v. Robertson* (38 La. Ann. 618), 201.
23. **Sabbath-breaking—constitutionality.]** An indictment lies against one laboring on Sunday, although he belongs to a sect who observes another day as the Sabbath, and conforms to their practice. *Scales v. State* (47 Ark. 476), 708.
24. **Trial—comments of counsel.]** The abuse of counsel's privilege of argument, in order to warrant a new trial, must have been so gross as to prejudice the prisoner's rights. *McConnell v. State* (22 Tex. Ct. App. 354), 647.
25. — exclusion of witnesses from court-room.] Expert witnesses as well as others may be excluded from the court room, except when testifying, in the discretion of the court. *Leache v. State* (23 Tex. Ct. App. 279), 638.

See WITNESS, 218.

CROPS.

See LANDLORD AND TENANT, 467.

CURTESY.

See MARRIAGE, 85, 752.

DAMAGES.

1. **Cutting timber—mistake.]** In an action of damages for trover of timber cut from the plaintiff's lands and hauled to a steamer, three and a half miles distant, the cutting having been done by mistake, the measure of recovery is the value at the time and place of cutting. *Ayres v. Hubbard* (57 Mich. 322), 361.
2. **Measure of—landlord and tenant—breach of contract to put in possession.]** In an action by a lessee against a lessor for a breach of a covenant to give possession, although there was no fraud or wrong conduct, the measure of damages is the value of the lease. *Snodgrass v. Reynolds* (79 Ala. 452), 601.

DAMAGES — *Continued.*

3. **Remote.]** In an action by the purchaser of a saw-mill and outfit to recover damages against the vendor because the property was inferior to that contracted for, losses sustained by the purchaser from abandoning planting operations, improvements made in order to carry on such business, losses of profits by reason of having received an inferior outfit, additional purchases of timber, stock, vehicles, etc., to run a mill of the capacity of that bargained for, and personal services of himself and assistant while he was running the mill, or until its capacity had been fully tested, do not form proper elements of damage. *Willingham v. Hooten* (74 Ga. 233), 435.

See EMINENT DOMAIN, 321.

DEDICATION.

See HIGHWAY, 143.

DEED.

1. **Delivery — intention.]** A father executed a deed of land to his two young children, but retained it in his own possession and continued to occupy and enjoy the premises until his death. *Held*, not alone sufficient to pass title. *Fain v. Smith* (14 Oreg. 82), 281.
2. **Escrow — delivery before performance of condition — estoppel.]** Where a deed is put in the hands of a third person, to be delivered only on payment of the purchase-money, the grantee being already in possession of the land, and subsequently obtaining the deed without payment, by fraudulent representations to the custodian, and deeding the land to a purchaser in good faith, the original grantor is estopped as to such purchaser. *Quick v. Milligan* (108 Ind. 419), 49.
3. **Insanity of grantor — disaffirmance.]** E., a person of unsound mind and unable to comprehend the transaction, without any consideration conveyed her real estate to T. by deed, which was duly recorded. To secure a loan of money with which to pay off delinquent taxes and other liens against the land, T. executed a mortgage thereon to H., who had no knowledge of E.'s unsoundness of mind, but advanced the money and accepted the security in good faith, relying on the public records. E. received no benefit from the money, either in person or estate. *Held*, that H. could not maintain an action to foreclose the mortgage as against E. *Hull v. Louth* (109 Ind. 315), 405.
4. **Reservation — "clays."]** An exception and reservation in a deed of all "metals and minerals," etc., and of "all valuable earths, clays, stones, paints and substances for the manufacture of paints," covers clay for making bricks. *Forster v. Runk* (109 Penn. St. 291), 720.

Evidence to contradict.] 135.

See COVENANT, 247.

DELIVERY.

See CARRIER, 468; DEED, 281; INSURANCE, 453.

DEVISE.

See WILL.

DOWER.

See MARRIAGE; WILL, 494.

EJECTMENT.

For flooding lands.] Ejectment does not lie for flooding lands by a dam. *Ezzard v. Findley Gold Mining Co.* (74 Ga. 520), 445.

ELECTIONS.

See CONSTITUTIONAL LAW, 375.

EMINENT DOMAIN.

1. **Damages.]** A railway company, having obtained a right of way by agreement from the tenant, supposing him to be the owner, and having constructed its road thereon, the owner is not entitled to have the value thereof considered in assessing the damages. *Oregon Railway & Navigation Co. v. Mosier* (14 Oreg. 519), 321.
2. **Taking mortgaged property — mortgagee entitled to damages.]** The mortgagee of land taken by a city for a public street may recover from the city the damages awarded, notwithstanding the amount has already been paid to the mortgagor. *Sherwood v. City of Lafayette* (109 Ind. 411), 414.
3. **Levee — railroad station.]** Lands in a city bordering upon water and dedicated as a public levee, or landing, may be condemned by legislative authority for the use of a railroad company, subject to the restriction that it shall not charge wharfage. *Portland and Willamette Valley Railroad Co. v. City of Portland* (14 Oreg. 188), 299.

ESCROW.

See DEED, 49.

ESTOPPEL.

Of married women by acknowledgment.] *See* MARRIAGE, 5.
See DEED, 49, WAREHOUSEMEN, 417.

EVIDENCE.

1. **Declarations — of agent — res gestæ.]** In an action for an injury by a railway accident, declarations of the locomotive engineer in charge of the train, to whose negligence the accident is attributed, made five minutes afterward, are incompetent as evidence. *Durkee v. Central Pacific Railroad Co.* (69 Cal. 533), 562.
 2. **Parol — to contradict deed as to assessments.]** In an action for breach of a covenant against incumbrances in a deed of land, parol evidence that a few days before the execution of the deed the parties orally agreed, that in consideration of the execution of the deed for a certain sum, the plaintiff would assume a liability to an assessment upon the land for betterments, is inadmissible. *Flynn v. Bourneuf* (143 Mass. 277), 185.
- Dying declarations.]** *See* CRIMINAL LAW, 537.

See CRIMINAL LAW, 181; NEGLIGENCE, 527.

EXEMPTION.

See CONSTITUTIONAL LAW, 479; HOMESTEAD, 530.

FIRE.

See NEGLIGENCE, 789.

FORGERY.

See CRIMINAL LAW, 659.

FRAUD.

See INFANT, 53; NEGOTIABLE INSTRUMENT, 630.

GAMING.

See CRIMINAL LAW, 633.

GENERAL AVERAGE.

See SHIP AND SHIPPING, 733.

GIFT.

See MARRIAGE, 259.

GOOD-WILL.

See TRADE-MARK, 149.

HIGHWAY.

1. **Dedication — acceptance.**] Where land was dedicated for a town park, a statute or vote of the town is not essential to constitute acceptance, but proof of public use as a park for many years will suffice. *Abbott v. Inhabitants of Cottage City* (143 Mass. 531), 143.
2. **Removing gravel in repairing.**] In the construction of a highway, the public authorities may not authorize the removal of soil from below grade on the land of one owner and using it in the construction of the highway over the land of others. *Robert v. Sadler* (104 N. Y. 229), 493.

HOMESTEAD EXEMPTION.

Married woman's claim.] A bill in equity to subject a married woman's equitable estate to a debt created by contract creates a lien, from the service of process, which is superior to a claim of homestead exemption subsequently created. *Hines v. Duncan* (79 Ala. 112), 530.

HOMICIDE.

See CRIMINAL LAW, 234.

HUSBAND AND WIF

See MARRIAGE.

IMPROVEMENTS.

See TENANTS IN COMMON, 253.

INDICTMENT.

See CRIMINAL LAW, 241.

INFANCY.

Contract—fraudulent representation as to age.] An action for deceit lies against an infant who has obtained property by the fraudulent representation that he was of age, and refuses to pay for it. *Rice v. Boyer* (108 Ind. 472), 53.

See CARRIER, 387; MUNICIPAL CORPORATION, 65, 508.

INJUNCTION.

To restrain libel.] Equity has no jurisdiction of a bill to restrain a person from publishing, in the records and books of a mercantile agency, false representations as to the business standing and credit of the plaintiff, if no breach of trust or of contract is involved. *Raymond v. Russell* (143 Mass. 295), 187.

See COVENANT, 363; TRADE-MARK, 155.

INNKEEPER.

Who is guest.] The keeper of a gambling house closed his night's business at two o'clock A. M.; visited an inn in the same city to deposit his money for safe-keeping; inquired of the clerk for lodgings for the night, stating that he did not desire to go to his room at that time, but wished to leave some money with the clerk, and would return in about half an hour. The clerk promised to reserve a room for him. He did not register, and no room was assigned him. He left his money with the clerk, received a check for it, and departed. He returned in about three hours to have a room assigned him and go to bed. The clerk had absconded with the money. *Held*, that he was not a guest and the innkeeper was not liable. *Arcade Hotel Co. v. Wiatt* (44 Ohio St. 88), 785.

INSANITY.

See CRIMINAL LAW, 262, 480, 638; DEED, 405.

INSURANCE.

1. **Accident—"total disability."]** A policy provided that in case of accidental injuries which should "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation," the insured should be indemnified against loss of time thereby "for such a period of continuous total disability" as should immediately follow, not exceeding, etc. In an action thereon, the jury were instructed that the defendant was liable if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor, that is, to do substantially all kinds of his accustomed labor, to some extent." *Held*, error. *Saveland v. Fidelity and Casualty Co. of New York* (67 Wis. 174), 863.

2. **Additional—notice to agent.]** An applicant for fire insurance told the agent issuing the policy that he meant to get other insurance, and asked

INSURANCE—*Continued.*

him to notify the company. The agent told him to get the insurance, and he would notify the company afterward. The applicant had no notice of any limitations of the agent's authority. *Held*, that the company was estopped to allege that the policy forbade additional insurance without its consent. *Kitchen v. Hartford Fire Insurance Co.* (57 Mich. 135), 344.

3. **Assignment.]** A policy on one's own life, the premiums having been fully or nearly paid up, may be effectually assigned by him to any person having no insurable interest in his life. *Bursinger v. Bank of Watertown*, (87 Wis. 75), 848.
4. **Interest.]** An assignment by a son of an insurance policy on his own life as security for a debt from his father to the assignee is valid. *Id.*
5. **Change of beneficiary — delivery.]** An unmarried man insured his life for the benefit of his sister, and delivered the policy to her. The policy was conditioned that he might change the beneficiary with the consent of the company. Subsequently he married, agreeing that if the woman would marry him she should be made the beneficiary. When he paid the next premium he paid it on condition that this change should be made. The sister would not give up the policy, and the change was not made. The insured having died, and the company having brought the sister and widow to interplead, *held*, that the widow was entitled to the fund. *Nally v. Nally* (74 Ga. 669), 438.
6. **Condition — notice — waiver.]** An insurance premium note was received by the authorized agent of the company, who executed for it a receipt, on the back of which was a notice that fifteen days before any installment was due the assured would be notified by the company. *Held*, that the omission to give such notification waived a condition for forfeiture in the policy. *Alexander v. Continental Insurance Company of New York* (67 Wis. 422), 869.
7. **Husband for wife — change of beneficiary — notice.]** An insurance policy was issued to a wife on the life of her husband, entitling the wife to have the profits applied on the premiums annually. The husband kept the policy and paid the premiums. The husband and wife separated, and the company knowing this fact, and without notice to the wife, entered into negotiations with the husband for a surrender and for the issue of a new policy payable to his estate, pending which the husband died leaving a premium due and unpaid, of which the wife was not notified. *Held*, that the company could not forfeit the policy. *Manhattan Life Insurance Company v. Smith* (44 Ohio St. 156), 806.
8. **Tornadoes — evidence.]** In an action on a policy of insurance against tornadoes, it is competent to show the effect of the storm on other property in the neighborhood, to determine whether it was a tornado. *Paggenow v. Mutual Fire, Lightning and Tornado Insurance Company* (69 Iowa, 157), 215.
9. **Warranty — breach — recovery of premiums.]** An innocent breach of warranty in an application for an insurance policy in a material matter, renders the policy void from the beginning, but the premiums paid may be recovered. *Insurance Company v. Pyle* (44 Ohio St. 19), 781.

JUDGE.

Disqualification by affinity.] In an action of ejectment, one of the plaintiff's lessors died pending the suit, leaving a will, in which his widow and others were appointed executors. The executors became parties to the suit. Before the trial, the widow died, having previously received all of the estate of her husband to which she was entitled. After her death, the suit proceeded in the name of the surviving executors. The presiding judge had been related to the widow within the fourth degree of consanguinity. He was elected judge after the death of both husband and wife. *Held*, that he was competent to preside on the trial. *Platterson v. Collier* (75 Ga. 419), 472.

JUDGMENT.

Bar — malicious prosecution — slander.] A judgment for defendant in an action for malicious prosecution is a bar to a subsequent action for slander for the same accusation, although uttered on a different occasion, but previously to the action for malicious prosecution. *Tidwell v. Witherspoon* (21 Fla. 359), 665.

JURISDICTION.

See CRIMINAL LAW, 375.

JUROR.

Competency — member of association to prosecute.] A member of a voluntary association, formed for the prosecution of violations of certain laws, is incompetent as a juror on the trial of a complaint for such a violation, instituted by an agent of the association, who is furnished by it with money for the expenses, and is paid for his services. *Commonwealth v. Moore* (148 Mass. 186), 128.

LANDLORD AND TENANT.

1. **Crops on shares — title.]** When a tenant rents land and agrees to pay the landlord a part of the crop in kind and actually delivers a part of it, the title thereto is in the latter, and is not subject to a judgment against the tenant. *Dartén v. Hill* (75 Ga. 229), 497.
2. **Nuisance — awning.]** A landlord of premises in exclusive possession and control of a tenant is not liable to a third person for injury by the fall of an awning intended solely as a protection against sun and rain, the fall having been occasioned by the tenant's negligent conduct in permitting a crowd of people to stand upon it. *Kutis v. Shattuck* (69 Cal. 593), 568.

See DAMAGES, 601.

LARCENY.

See CRIMINAL LAW, 372.

LIBEL AND SLANDER.

1. **Drunkenness — apology.]** Drunkenness or an unaccepted apology is not a defense to slander. *Williams v. McManus* (38 La. Ann. 161), 171.
2. **One not participating in provocation.]** Provoking acts are not a defense to slander of one who did not participate in them. *Id.*

MERGER.

See MORTGAGE, 1237.

MISTAKE.

See DAMAGES, 361 ; WILL, 71.

MORTGAGE.

1. *Chattel—of unweaned colts.*] A mortgage of a mare covers her colts subsequently foaled until they are weaned. *Rogers v. Highland* (69 Iowa, 504), 230.
2. *Merger.*] A debtor executed a mortgage as security for a liability incurred by his surety. Afterward, the surety having paid the debt, the debtor deeded the land to him, subject to the mortgage, and providing that it was "to remain open." *Held*, no merger. *Agnes v. Charlotte, Columbia and Augusta Railroad Co.* (24 S. C. 18), 237.

See EMINENT DOMAIN, 414.

MUNICIPAL CORPORATION.

1. *Defect in street—absence of railing.*] Plaintiff was driving in the daytime upon a street in a city, when his horse became so frightened at a bicycle that the driver lost control of him, and the horse left the road, stepped over the gutter and curb, and ran along the sidewalk, and went over an embankment twelve feet high, at a point where the street was graded up twelve feet, carrying with him the plaintiff. The road-bed of the street was thirty feet wide, and the sidewalks were ten feet wide, the curbstone eight inches high. The street had been in the same condition for ten years, and this was the first accident of the kind. *Held*, that the city was not liable for the consequent injury. *Hubbell v. City of Yonkers* (104 N. Y. 434), 522.
2. — *knowledge of policeman.*] Knowledge by a policeman of a defect in a city street is imputable to the city. *Carrington v. City of St. Louis* (39 Mo. 208), 108.
3. *Disobedience to mandamus—contempt.*] When a city council has been ordered by *mandamus* to pay a debt, and refuses obedience, the members voting against the payment are guilty of contempt. *State v. Judge of Civil District Court* (38 La. Ann. 43), 158.
4. *Icy sidewalk.*] A city is not liable for an injury sustained by a traveller by a fall upon a level sidewalk by reason of smooth ice, it not appearing that it was at a greatly frequented place. *Chase v. City of Cleveland* (44 Ohio St. 504), 343.
5. *Negligence—dangerous excavation for bridge—infant.*] A city, in constructing a bridge, in continuation of a street, excavated the bed of the stream, and built a levee from the bank to the excavation, leaving it unwatched and without safeguards. A child, five years old, at play, fell into the excavation and was drowned. The city authorities knew the habit of young children to play in the neighborhood. *Held*, that the city was liable. *City of Indianapolis v. Emmelman* (108 Ind. 530), 65.

MUNICIPAL CORPORATION — *Continued.*

6. — **defect in street — infant playing — parent's negligence.**] A. placed a large, heavy counter on the sidewalk of a frequented street in a busy part of a city, in such a manner as to be easily thrown down. Four days afterward the counter was thrown down by children running against or jumping upon it in play, and fell upon G., one of those children, aged five or six years, inflicting fatal injuries. There was evidence that G.'s father went into a store near by, leaving G. at the door, cautioning him not to go far away; the father returned in from two to five minutes, during which time the accident happened. By a city ordinance the placing of the counter on the sidewalk was unlawful, and the city officials were authorized to remove it. *Held*, that the court erred in nonsuiting the administrator of the deceased in an action against the city for his death. *Kunz v. City of Troy* 104 (N. Y. 844), 508.
7. — **nuisance — shooting gallery.**] A city licensed a shooting gallery. It was a mere tent adjoining a sidewalk. The plaintiff in passing was injured by a ball coming through the tent. *Held* (1), that the structure did not constitute an "insufficiency" of the street, within the statute; (2), that a shooting gallery in a city is not *per se* a nuisance. *Hubbell v. City of Viroqua* (67 Wis. 343), 866.
8. **Power to punish disobedience of ordinances.**] A city has no power to punish disobedience of its ordinances by fine, imprisonment or other penalty, unless it is expressly granted by its charter. *State v. Bright* (38 La. Ann. 1), 155.
9. **Sewer — negligence in plan.**] A city is not liable for an injury to private property by the overflowing of a sewer, caused by its incapacity, resulting from a mere error of judgment not amounting to gross negligence. *Rice v. City of Evansville* (108 Ind. 7), 22.
10. **Street — defect — ice and snow.**] The mere accumulation of ice and snow in city streets does not constitute a "defect" nor a want of "good repair." *McKellar v. Detroit* (57 Mich. 159), 387.

Ordinance.] *See* CONSTITUTIONAL LAW, 443.

Regulation of street railroads.] *See* CONSTITUTIONAL LAW, 83

See CONSTITUTIONAL LAW, 12.

NEGLIGENCE.

1. **Communication of fire — intervening building.**] In an action of damages for the negligent communication of fire, it is no defense that the fire was directly communicated from an intervening building to the premises in question, which were two hundred feet from the building first ignited. *Adams v. Young* (44 Ohio St. 80), 789.
2. **Contributory — engineer remaining at post.**] It is not necessarily negligent in a locomotive engineer to remain at his post when a collision is imminent. *Central Railroad v. Crosby* (74 Ga. 737), 463.
3. — **presumptions.**] An experienced brakeman, when last seen alive, was setting the brake on a freight car. The train separated in front of him and he was found on the track run over and killed. *Held*, that this

NEGLIGENCE — *Continued.*

proof justified the submission of the question of contributory negligence to the jury. *Burns v. Chicago, Milwaukee & St. Paul Ry. Co.* (89 Iowa, 450), 227.

4. **Presumption — killing cattle.**] In an action against a railroad company for killing cattle, negligence on the part of the defendant is not presumed from proof of the killing. *Savannah, etc., Ry. Co. v. Geiger* (21 Fla. 689), 697.

Contributory.] See CIVIL DAMAGE ACT, 218.

See BAILMENT, 117; CARRIER, 111, 177, 387, 468; CONFLICT OF LAW, 138; CORPORATION, 708; MASTER AND SERVANT, 8, 120, 722, 881; MUNICIPAL CORPORATION, 22, 65, 108, 357, 508, 522, 848, 866; PARENT AND CHILD, 276.

NEGOTIABLE INSTRUMENT.

1. **Accommodation indorser — fraud.**] An accommodation indorser is liable to a holder in good faith, although the indorsement was procured by the maker's fraud in concealing a condition annexed to a prior indorsement. *Marks v. First National Bank* (79 Ala. 550), 620.
2. **Bill of exchange — acceptance by agent — parol evidence.**] The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Company," was described as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." *Held*, that the acceptance was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him, parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant intended to bind the drawer as his principal, and that this was known to the plaintiff when it acquired the paper. *Robinson v. Kanawha Valley Bank* (44 Ohio St. 441), 829.
3. **Draft — parol evidence to vary liability.**] Parol evidence of an agreement between payee and drawer that the drawer of a bill was not to be liable is inadmissible. *Cummings v. Kent* (44 Ohio St. 93), 796.
4. **Indorser after negotiation.**] A stranger to a note, who indorses it after its inception, to give the payee credit with a proposed purchaser, is liable as a guarantor, without protest and notice. *Castle v. Rickly* (44 Ohio St. 490), 839.
5. **Indorsement after payment — evidence.**] In an action by the holder against the payee, indorser of a promissory note, the latter may show that he indorsed it after payment at the plaintiff's request, as evidence of payment. *Spencer v. Sloan* (108 Ind. 183), 85.
6. **Consideration.**] A prior existing debt is a valid consideration for the pledge of negotiable paper as security for its payment. *Id.*

See PATENTS, 40.

NOTARY.

See OFFICE AND OFFICER, 438.

NOTES.

- Carriers** — contributory negligence of passengers on freight train, 118.
- Conflict of laws** — death by negligence, 143.
- Criminal law** — declarations — *res gesta*, 194.
 — dying declarations — preliminary examination, 587.
- Damages** — measure — breach of landlord's covenant to put tenant in possession, 606.
- Deed** — delivery — when essential, 289.
- Ejectment** — for flooding lands, 447.
- Evidence** — declarations of agents — *res gesta*, 565.
- Highway** — dedication — acceptance, 146.
 — right to remove gravel for repairs, 500.
- Insurance** — life — assignment by insured, 852.
- Libel** — privileged communication — candidate for office, 685.
- Marriage** — gift from wife to husband, when presumed, 261.
 — estoppel of married woman by acknowledgment of deed, 7.
- Master and servant** — agreement to waive liability for negligence, 836.
 — contributory negligence by remaining in service, 125.
 — discharge — remedy, 828.
 — negligence — defective machinery — co-servants, 725.
- Municipal corporation** — duty to fence embankments in streets, 526.
 — *mandamus* to common council — liability of members for disobedience, 161.
- Negligence** — contributory — presumption, 229.
 — presumption — railroad killing cattle, 708.
 — proximate and remote cause — communication of fire, 795.
- Office and officer** — notary — attestation by one *de facto*, 440.
- Partnership** — participation in profit and loss, 99.
- Sale** — title to remain in seller until payment — when condition void, 836.
- Statute of limitations** — new promise — sufficiency, 749.
- Sunday** — constitutionality of Sunday law, 772.
- Trial** — comments of counsel — new trial on account of, 648.
- Trust** — for charity — preservation of private burying ground, 599.
- Will** — mistake in description of land, 74.
- Witness** — instructing in nature of oath, 658.

NUISANCE.

- Blasting** — injury to adjacent property.] The owner of a city lot blasting rocks on his lot with gunpowder is liable for the natural and proximate injury to adjacent property, whether from contact of rock or from concussion. *Colton v. Onderdonk* (89 Cal. 155), 556.

See LANDLORD AND TENANT, 568.

OFFICE AND OFFICER.

1. *Liability of officer de facto to officer de jure for salary.*] A city policeman, wrongfully removed from office, may not recover from the city his salary paid to his successor, until after an adjudication establishing his right. *Selby v. City of Portland* (14 Oreg. 243), 307.
2. *Notary — attestation after term.*] The attestation of an affidavit by a notary after the expiration of the term of his office, both parties acting in good faith, is valid. *Smith v. Bondurant* (74 Ga. 416), 436.

ORDINANCE.

See CONSTITUTIONAL LAW, 442; MUNICIPAL CORPORATION, 155.

PARENT AND CHILD.

Negligence — agency of child.] Evidence that a minor son was in the habit of driving his father's team to convey the family to church, with the acquiescence of the father, and of an older daughter, who in the father's absence was in charge of the family, business and property, held sufficient presumptively to charge the father with liability for the son's negligence in driving the team on another occasion. *Schaefer v. Osterbrink* (87 Wis. 495), 876.

See MUNICIPAL CORPORATION, 508.

PARTNERSHIP.

1. *Insolvent surviving partner — right of creditors.*] Where the surviving partner of a firm becomes insolvent, and his individual creditors levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets. *Farley v. Moog* (79 Ala. 148), 595.
2. *Of lawyers — winding up.*] On dissolution of a partnership between lawyers each is entitled to share in the fees collected from the unfinished business. *Osment v. McElrath* (68 Cal. 466), 17.
3. *Statute of frauds*] An agreement by one to wind up the business and pay the other his share of the fees collected is valid and is not within the statute of frauds, although it was not expected that the business could be wound up in a year. *Id.*
4. *Participation in profit and loss.*] A mere participation in profit and loss does not necessarily constitute a partnership, as to antecedent creditors, but the parties must have an interest also in the property which is the subject of the business association. *Clifton v. Howard* (89 Mo. 193), 97.

See STATUTE, 726.

PATENTS.

1. *State regulation of sale — notes.*] A State statute requiring the vendor of a patent right to file with the county clerk copies of the letters-patent and to make an affidavit that the letters are genuine and unrevoked, and that he has authority to sell, and that the words "given for a patent right," shall be inserted in any obligation taken therefor, is valid as to

PATENTS—*Continued.*

promissory notes, and a promissory note taken by the vendor of a patent right, who has not complied with the statute, which does not contain those words, is inoperative as between the parties, and as to a purchaser with notice, unless he shows that his indorser was a purchaser in good faith. *New v. Walker* (108 Ind. 365), 40.

For ore.] *See* WATER AND WATER-COURSES, 740.

PERCOLATION.

See WATER AND WATER-COURSES, 553.

PHYSICIANS.

See CONSTITUTIONAL LAW, 460.

PRESUMPTIONS.

See NEGLIGENCE, 227.

PRINCIPAL AND AGENT.

See AGENCY, 197.

PRIVILEGED COMMUNICATION.

See LIBEL AND SLANDER, 574, 676.

PROPERTY.

See ANIMALS, 476.

PUBLIC POLICY.

See CONTRACT, 369.

RAILROADS.

1. **Duty to provide stations.]** A railroad company is under no obligation to provide stations for passengers or warehouses for freight, unless expressly required by statute. *People v. New York, Lake Erie and Western Railroad Company* (104 N. Y. 58), 484.
2. **Duty toward licensees at crossings.]** When a railroad company has long, constantly and notoriously permitted the public to cross its track at a place not in a highway, it is bound to use reasonable care toward persons so crossing, and to give notice and warning to them, and what constitutes reasonable care is a question of fact. *Byrne v. New York Central and Hudson River Railroad Company* (104 N. Y. 382), 512.
3. **Obstruction of drains by embankment.]** A railroad company obstructing the ditches and drains of a plantation and causing an overflow by its embankment is liable for the consequent loss of crops. *Payne v. Morgan's Louisiana and Texas Railroad and Steamship Co.* (38 La. Ann. 134), 171.
4. **Statute — time to procure tickets.]** Under a statute permitting railroad companies to make an extra charge for fares paid in the cars, when a reasonable time has been allowed to procure tickets before the starting of the train, it is not necessary to keep open the ticket office at a small station until the very moment of starting. *Eberett v. Chicago, Rock Island and Pacific Railway Company* (69 Iowa, 15), 207.

RAILROADS — *Continued.*

5. **Street — ordinance fixing fares — separate lines to different termini.]** A municipal ordinance provided that the fare on any horse railway in the city should not exceed five cents. When it was enacted the defendant was operating a single line of railway. Afterward it constructed and operated other lines diverging from the main line. *Held*, that the ordinance did not confer the right, upon payment of five cents, to ride on a car bound for one *terminus*, and at the point of divergence, to take another car to a different *terminus*. *Ellis v. Milwaukee City Railway Company* (87 Wis. 185), 858.

See CARRIERS, 111, 162, 887, 468, 848; CONSTITUTIONAL LAW, 615; EMINENT DOMAIN, 299; MASTER AND SERVANT; NEGLIGENCE, 697.

RAPE.

See CRIMINAL LAW, 201, 530.

SABBATH BREAKING.

See CRIMINAL LAW, 768.

SALE.

1. **By wholesale to retail dealer — condition that title shall remain in vendor until payment — when fraudulent and void.]** When a manufacturer and wholesale vendor of wagons sells upon credit and delivers them to a retail dealer for the apparent and implied purpose of resale, a condition that the title shall remain in the vendor until the purchase price is paid, is fraudulent and void as against a purchaser from the vendee. *Winchester Wagon Works and Manufacturing Co. v. Carman* (109 Ind. 31), 333.
2. **Implied warranty of wholesomeness of provisions.]** A baker impliedly warrants the wholesomeness of bread which he sells at a discount to the peddler who distributes it. *Sinclair v. Hathaway* (57 Mich. 60), 827.
3. **Warranty — when not implied.]** The plaintiff, a market gardener, bought Wakefield cabbage seed, of the defendant, in 1881, which produced a good crop. The next year he asked him if he had "any more Wakefield cabbage seed, same as in 1881." The defendant replied that he had some of the old stock, and produced some seed in envelopes, part of the old stock, which the plaintiff bought. It was impossible to distinguish Wakefield cabbage seed by its appearance. The plaintiff planted the seed, and the crop was not Wakefield cabbage, and was almost worthless. *Held*, that the defendant was not liable in damages. *Shisler v. Baxter* (109 Penn. St. 443), 738.

See WAREHOUSEMEN, 417.

SCHOOLS.

- Practicing music — reasonableness of the rule.]** A rule that pupils in a public high school shall employ a certain period in the study and practice of music, and provided themselves with certain books therefor, is valid, and an expulsion for unexcused disobedience thereof will be sustained. *State v. Webber* (108 Ind. 31), 80.

SHIP AND SHIPPING.

General average bond — unseaworthiness.] In an action on a general average bond it is a good defense that the loss was occasioned by the unseaworthiness of the vessel. *Cheraw & Salisbury Railroad Co. v. Broadnas* (109 Penn. St. 482), 738.

SLEEPING CAR COMPANY.

See CARRIER, 185.

STATE.

Action by.] *See* CONSTITUTIONAL LAW, 590.

STATUTE.

"Transacting business" — partnership.] A firm in Philadelphia, having a branch house in New York, orally leased part of its premises situated in New York. The firm was doing business under the name of Kohn, Adler & Co., although there was no Adler in the firm. *Held*, that the leasing was not "transacting business," within the meaning of the New York penal statute forbidding the transaction of business in the name of a partner not interested in the firm. *Sparrow v. Kohn* (109 Penn. St. 339), 726.

See RAILROADS, 207.

STATUTE OF FRAUDS.

Agreement to wind up business.] An agreement by one of a firm of lawyers to wind up the business and pay the other his share of fees collected is not within the statute of frauds, although it was not expected that the business could be wound up in a year. *Osmont v. McElrath* (68 Cal. 466), 17.

STATUTE OF LIMITATIONS.

1. **Mutual accounts.]** In case of mutual accounts the statute of limitations does not begin to run until the last item on either side. *Gunn v. Gunn* (74 Ga. 555), 447.
2. **New promise — sufficiency.]** A new promise, to revive a debt barred by the statute of limitations, must identify the debt explicitly and certainly. *Landis v. Roth* (109 Penn. St. 621), 747.
3. **Store account.]** A statute limiting actions for "any article charged in a store account," applies to wholesale as well as retail stores, wherever situated and without regard to the use of the goods. *Salomon v. Pioneer Co-operative Company* (21 Fla. 874), 667.

See TRESPASS, 333.

SUBSCRIPTION.

See CONTRACT, 126.

SUNDAY.

See CRIMINAL LAW, 703.

SURETY.

See BOND, 223; MARRIAGE, 263.

SURFACE WATER.

See WATER AND WATER-COURSE, 226.

TAXATION.

Exemption — "property employed in the manufacture of wood." Vessels employed to convey timber to saw-mills are not exempt from taxation as "property employed in the manufacture of articles of wood." *Martin v. City of New Orleans* (88 La. Ann. 397), 194.

Of inheritances.] *See* CONSTITUTIONAL LAW, 502.

TELEGRAPH.

1. **Limitation of liability** — statutory penalty.] A condition on a telegraph blank, that the company shall not be liable for any claim of damages unless presented within sixty days, does not relieve from a statutory penalty for negligent delay in transmitting or delivering messages. *Western Union Telegraph Co. v. Cobb* (47 Ark. 344), 756.
2. **Unrepeated message** — mistake — burden of proof.] Under a stipulation that a telegraph company shall not be liable for mistake in transmission of unrepeated messages, beyond the price received for sending, a plaintiff may not recover beyond this limit for such a mistake unless he affirmatively shows want of care or skill. *Aiken v. Western Union Telegraph Co.* (69 Iowa, 81), 210.

TENANCY.

See WILL, 26.

TENANTS IN COMMON.

Improvements.] A tenant making improvements in the belief that he is sole owner may not be charged with the rent of them and may be reimbursed for them in partition. *Johnson v. Pelot* (24 S. C. 254), 253.

TRADE-MARK.

1. **Assignability.**] The trade-mark, "A. N. Hoxie's Mineral Soap" is assignable, and if the assignee uses it to denote soap made according to A. N. Hoxie's formula, he may have an injunction to restrain infringement. *Hoxie v. Chaney*; *Chaney v. Hoxie* (143 Mass. 592), 149.
2. **Good-will** — injunction.] A sale of the owner's business and its good-will carries a trade-mark, but does not imply that the vendor will not re-engage in the like business at another place, but he may be restrained from representing himself as successor to the business sold or as having a right to use the trade-mark. *Id.*
3. **Infringement.**] The plaintiff manufactured and sold chocolate under the description of "German Sweet Chocolate," having obtained authority to use it from Samuel German, the original proprietor. The defendant, with intent to get plaintiff's customers, manufactured and sold chocolate under the description of "Sweet German Chocolate." *Held*, that the defendant should be restrained therefrom. *Pierce v. Guittard* (68 Cal. 68), 1.

TRESPASS.

Continuing — statute of limitations.] Breaking through the partition of an adjoining mine is not a trespass unless accompanied by an encroachment upon the latter premises, and where an action for such an encroachment is barred by the statute of limitations, the subsequent flow of water through the opening does not afford a basis for an action. *National Copper Co. v. Minnesota Mining Co.* (57 Mich. 83), 833.

TRIAL.

1. **Court questioning witness.]** In a criminal case, it is the duty of the presiding judge to question reluctant witnesses, if necessary to elicit the truth. *Varnedoe v. State* (75 Ga. 181), 465.
2. **Right to clear court-room.]** On a rape trial, where a young female witness was embarrassed and unable to testify on account of laughter in the audience, the court removed from the room all the audience except the officers, attorneys and jurors. *Held*, no error. *Grimmett v. State* (22 Tex. Ct. App. 36), 690.
3. **Witness — privately instructing in nature of oath.]** A prosecutrix for rape having disqualified herself upon her *voir dire* with regard to her knowledge of the nature and obligation of an oath, the State was permitted to take her to a private office and instruct her thereupon. She was thereupon returned into court, and replying that she then understood the test, was held competent as a witness. *Held*, error. *Taylor v. State* (23 Tex. Ct. App. 529), 656.

Comments of counsel.] See CRIMINAL LAW, 647.

Right to exclude expert witnesses.] See CRIMINAL LAW, 633.

See WITNESS, 296.

TRUST.

See WILL, 596.

VENDOR AND PURCHASER.

Vendor's lien.] On a conveyance of land by deed, a lien arises in equity for the unpaid purchase-money. *Gee v. McMillan* (14 Oreg. 268), 815.

WAREHOUSEMAN.

Sale — commingling of grain — estoppel.] One who deposits wheat for storage, knowing that it is to be commingled with wheat owned by the warehouseman, and that the latter is selling and publicly shipping from the common mass, is estopped to assert title as against an innocent purchaser in the usual course of business. *Preston v. Witherspoon* (109 Ind. 457), 417.

WARRANTY.

See INSURANCE, 781 ; SALE, 327, 728.

WATER AND WATER-COURSES.

1. **Patent — right to minerals under bed of stream — island.]** A patent entitling the patentee to coal and minerals, under the bed of a navigable

2

WATER AND WATER-COURSES — *Continued.*

river from low-water mark on one shore to the same line on the other, does not entitle him to the minerals under an island within the bounds of his patent, which was subject to application and sale under laws existing before the law under which his patent was granted, and still in force. *Pennsylvania Coal Company v. Winchester* (109 Penn. St. 572), 740.

2. **Percolation — rights in.]** Percolating water, collected and running in a defined channel, is property, the use of which is acquirable by grant or appropriation. *Cross v. Kitts* (69 Cal. 217), 558.
3. **Surface-water — street lots.]** The owner of a city lot may turn the rain from it to the adjacent street, although it may injure a neighboring lot below grade. *Phillips v. Waterhouse* (69 Iowa, 199), 220.

See EJECTMENT, 445; RAILROADS, 174.

WILL.

1. **Charitable trust — preservation of private burying-ground.]** A bequest of money to county commissioners, "and their successors in office, or to such authority as may control and direct the finances of said county, to be held in perpetuity in trust," and the interest to be expended annually in the repair, preservation and neat keeping of the graves and monuments of the testatrix and other named relatives, is not a bequest to a charitable use, within the exception to the rule against perpetuities, and is void. *Johnson v. Holifield* (79 Ala. 423), 596.
2. **Description of land — mistake.]** A will contained this provision: "As to my real estate, I dispose of it as follows: "I own the east half of the north-west quarter," etc., and I hereby give and bequeath the same to my son," etc. The testator did not own the east half of the north-west quarter, but did own the west half. *Held*, that the will should be made to operate upon the land intended. *Pocock v. Redinger* (108 Ind. 578), 71.
3. **Devise — restraint on alienation.]** A testator devised lands in fee to a trustee in trust for his daughter, with a provision that neither she nor her husband should ever dispose of them. *Held*, that the restraint was ineffectual at any time while she was single, but became operative upon and during any marriage contracted by her before disposing of them. *Robinson v. Randolph* (31 Fla. 629), 692.
4. **Dower — election.]** A testator willed his residuary estate, consisting of both real and personal property, to his executors to sell it and divide the proceeds equally between his wife and children, share and share alike. *Held*, that the widow took dower in addition. *Konvalinka v. Schlegel* (104 N. Y. 125), 494.
5. **Life estate in leased land — death of life tenant during term — title to rents.]** A devisee for life of land subject to a lease made by the testator, dying during the term, before any rent accrues, the rent goes to the reversioner, and is not carried by a bequest of all the testator's personalty, including notes and accounts. *Watson v. Penn* (108 Ind. 21), 26.
6. **Rule in Shelley's case — fee.]** A testator devised lands in trust for Matilda, the wife of his son Mark, "and her heirs forever;" directing that she

WILL — *Continued.*

should have the sole use, control, benefit and profits thereof, independent of her husband, and that at her death "the heirs of her body" should control and enjoy the same; provided that if on Mark's death Matilda should survive, the heirs of her body, then living, should receive two-thirds of the profits, and if Matilda should marry again, the heirs of her body then living should manage and control the lands, giving to Matilda one third of the profits for her life, and that Matilda's issue by any other husband should not take, and that Matilda should not alienate the lands after Mark's death. *Held*, that Matilda took a fee. *Allen v. Craft* (109 Ind. 476), 425.

WITNESS.

1. **Impeachment of hostile, by party calling him.]** On an issue of fraud by an assignor, in the making of an assignment, defendant called the assignor as a witness. A portion of his testimony showed that he had provided for fictitious debts. This was followed by an explanation which, if true, showed that he did in fact owe such debts. The trial court ruled that as the explanation stood uncontradicted by any other witness, defendant was bound by what the assignor had testified to, for the reason that he could not discredit or impeach him. *Held*, error, that the evidence should have been submitted to the jury for them to pass upon its credibility. *Becker v. Koch* (104 N. Y. 394), 515.
2. **Parties — exclusion from court-room.]** A statute providing that during a trial the judge may exclude from the court-room any witness of the adverse party not at the time under examination, does not authorize the exclusion of a party to the cause. *Schneider v. Haas* (14 Oreg. 174), 296.
3. **Privilege — selling intoxicating liquors.]** A purchaser of intoxicating liquors, under the prohibitory law, is not a participant in the crime, nor entitled to excuse himself from testifying as to the purchase. *Wakeman v. Chambers* (69 Iowa, 169), 218.
4. **Understanding of oath.]** A boy of twelve years who habitually repeated the Lord's prayer, and had heard that the bad man caught those who lied, cursed, etc., but had never heard of a God, or the devil, or of heaven or hell, or of the Bible, and had never heard and had no idea what became of the good or of the bad after death, is not a competent witness. *State v. Belton* (24 S. C. 185), 245.

Instructing.] See TRIAL, 656.

See CRIMINAL LAW, 638; TRIAL, 465, 630.

WORDS.

"Clays." See DEED, 720.

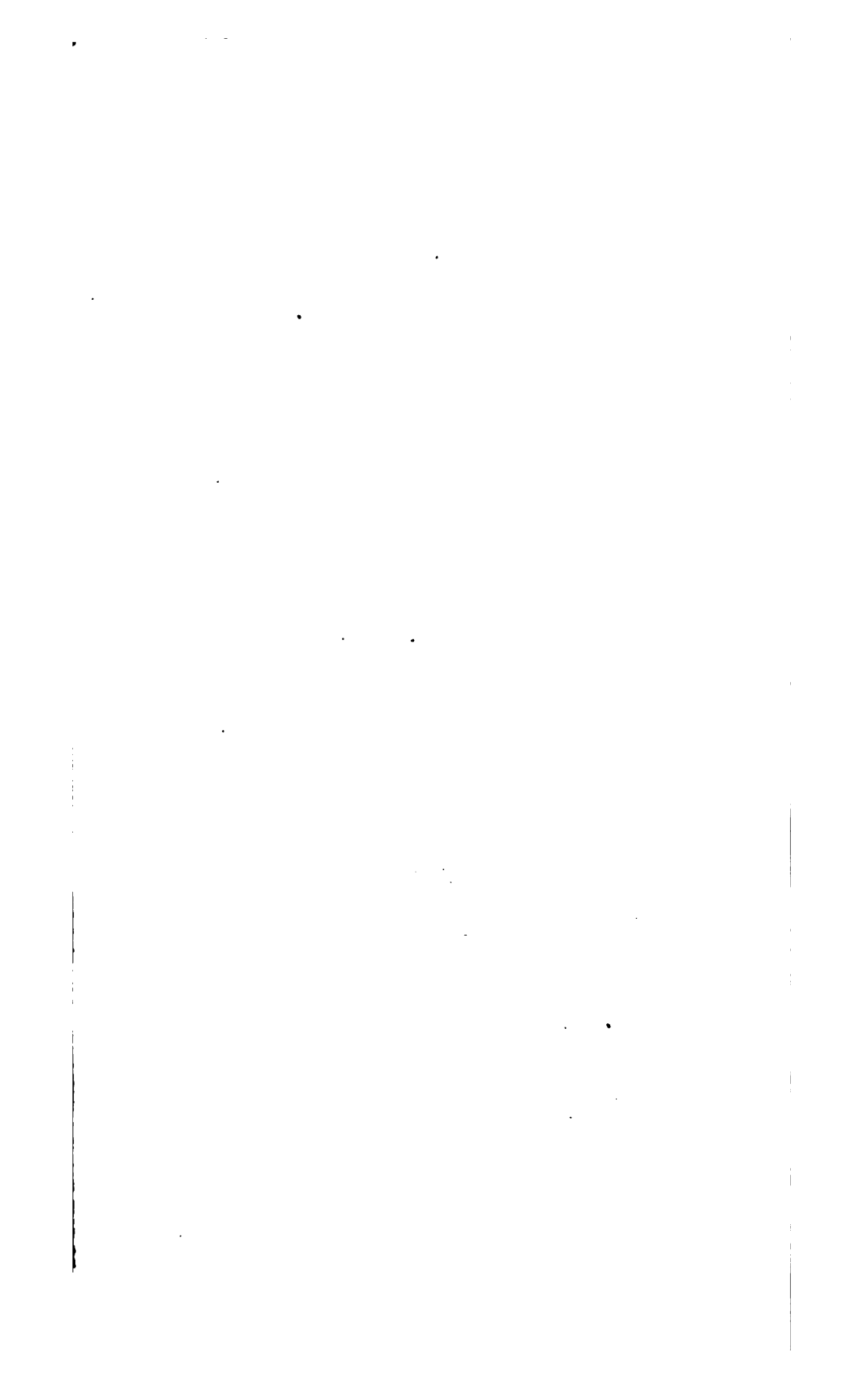
"Dangerous weapon." See CRIMINAL LAW, 202.

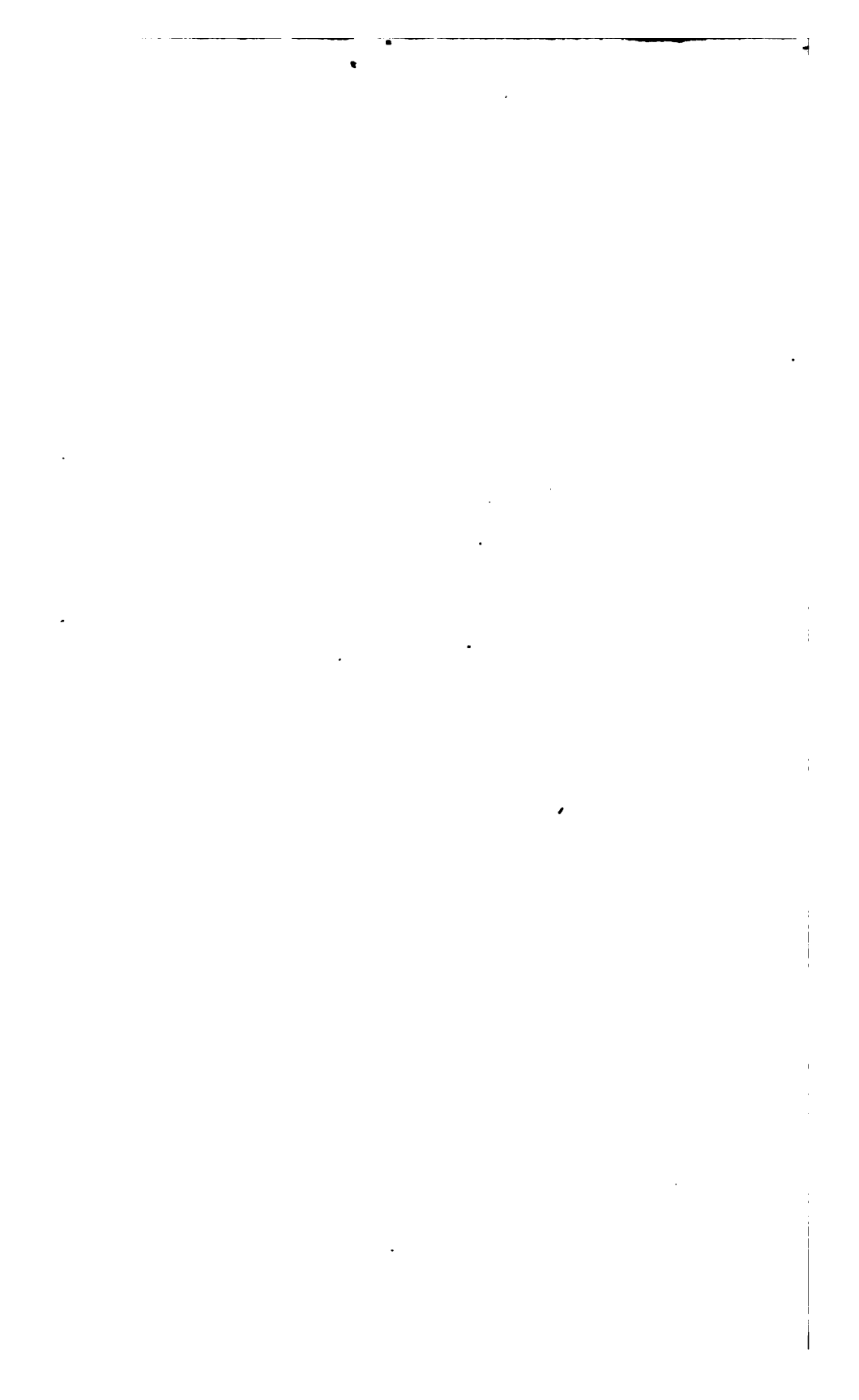
"Property employed in the manufacture of wood." See TAXATION, 194.

"Store account." See STATUTE OF LIMITATIONS, 667.

"Total disability." See INSURANCE, 863.

"Transacting business." See STATUTE, 726.











3 6105 063 241 389

